Supreme Court, U. S.
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APPENDIX

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978
No. 78-630

STATE OF WASHINGTON, ET AL.,
Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,
Appellees.

STATE OF WASHINGTON,
Appellant,

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

FILED OCTOBER 13, 1978
JURISDICTION POSTPONED FEBRUARY 21, 1979

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES*

Cause No. 3868 below—The *Colville* Case

May 17, 1973—Plaintiffs' original complaint for declaratory judgment, injunction and damages filed in U.S. District Court for Eastern District of Washington.

May 17, 1973—Plaintiffs filed application for convening of three-judge district court.

June 18, 1973—District Court enters certificate requesting three-judge court (certifying necessity of three-judge court).

August 2, 1973—Plaintiffs file motion for temporary restraining order.

September 19, 1973—Plaintiffs file motion for preliminary injunction.

September 28, 1973—District Court enters order denying temporary restraining order.

October 5, 1973—Plaintiffs renew motion for temporary restraining order.

November 5, 1973—District Court enters temporary restraining order restraining defendants from enforcing state statutes regarding tribal cigarette sales.

August 26, 1974—Preliminary pretrial conference held.

September 5-6, 1974—Hearing on motions before three-judge court.

September 6, 1974—Three-judge court enters preliminary injunction against state defendants.

January 24, 1975—Plaintiffs file amended and supplemental complaint for declaratory judgment, injunction and damages.

June 27, 1975—Second preliminary pretrial conference held.

February 4, 1977—Third preliminary pretrial conference.

*Since this appeal is from two consolidated causes below, Nos. 3868 and 3909 respectively, the docket entries will be listed separately for these two causes. See, J. S. App. 2.

March 28, 1977—Pretrial order entered.

March 28, 1977—Trial of action before three-judge district court.

February 22, 1978—Consolidated decision rendered by three-judge court.

May 10, 1978—Declaratory judgment and decree of permanent restraint entered by three-judge court.

May 22, 1978—Defendants file motion for partial new trial.

July 12, 1978—Defendants file Notice of Appeal to the Supreme Court of the United States.

July 17, 1978—District court enters order denying defendants' motion for partial new trial.

August 14, 1978—Defendants file second Notice of Appeal to the Supreme Court of the United States.

September 8, 1978—Defendants file amended Notice of Appeal to the Supreme Court of the United States.

February 21, 1979—U.S. Supreme Court enters order postponing further consideration of jurisdiction to the hearing of the case on the merits.

Cause No. 3909 below—the *Yakima* case

July 18, 1973—Complaint filed by United States of America.

July 19, 1973—U.S. files petition for determination by a three-judge court.

July 20, 1973—District Court enters certificate requesting three-judge court (certifying necessity of three-judge court).

September 14, 1973—U.S. files motion for preliminary injunction.

October 19, 1973—United States files motion for temporary restraining order.

November 5, 1973—District Court enters order granting leave to intervene as party-plaintiff to the Confederated Bands and Tribes of the Yakima Indian Nation as intervenor-plaintiff.

November 5, 1973—District Court enters temporary restraining order against state defendants.

April 24, 1974—Tribe files complaint in intervention.

August 26, 1974—Preliminary pretrial hearing.

September 5-6, 1974—Hearing on motions before three-judge court.

September 6, 1974—District Court enters order granting preliminary injunction against defendant State of Washington.

October 4, 1974—United States files amended complaint.

June 27, 1975—Pretrial hearing conducted.

September 18, 1975—Additional pretrial conference held.

February 28, 1977—Supplemental pretrial order entered.

March 28, 1977—Trial held before three-judge district court.

February 22, 1978—Three-judge court enters consolidated decision.

May 10, 1978—Three-judge district court enters declaratory judgment and decree of permanent restraint.

May 22, 1978—Defendant State files motion for partial new trial.

July 17, 1978—District Court enters order denying defendants' motion for partial new trial.

August 14, 1978—Defendant State files Notice of Appeal to the Supreme Court of the United States.

February 21, 1979—United States Supreme Court enters order postponing further consideration of jurisdiction to the hearing of the case on the merits.

CAUSE NO. 3868 BELOW— THE *COLVILLE* CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CIVIL NO. 3868

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND DAMAGES

[*Filed May 17, 1973*]

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Plaintiffs,

v.

STATE OF WASHINGTON and GEORGE KINNEAR, Individually and as Director of the State of Washington Department of Revenue,

Defendants.

FOR A FIRST CLAIM FOR RELIEF against defendants, plaintiffs aver:

1.1 Plaintiffs.

(a) Plaintiff Colville Confederated Tribes is a sovereign Indian tribe recognized by the United States Government and situated on the Colville Indian Reservation in the Eastern District of Washington. The Tribes are governed by a Constitution and By-laws approved by the Secretary of the Interior on December 26, 1938.

(b) Plaintiff Lummi Indian Tribe is a sovereign Indian tribe, recognized by the United States Government and situated on the Lummi Indian Reservation in the Western District of Washington. The Tribe is governed by

a Constitution and By-laws approved by the Secretary of the Interior on April 10, 1970.

(c) Plaintiff Makah Indian Tribe is a sovereign Indian tribe recognized by the United States Government and situated on the Makah Indian Reservation in the Western District of Washington. The Tribe is governed by a Constitution and By-laws approved by the Secretary of the Interior on May 16, 1936.

1.2 Defendants.

Defendants are the State of Washington and the Director of its Department of Revenue, which is charged with the duty under state law of collecting and enforcing the excise tax statutes of the state.

1.3 Jurisdiction.

This is an action by three Indian tribes with governing bodies duly recognized by the Secretary of the Interior, and in which the matter in controversy arises under Article I, Sec. 8, Cl. 3 of the United States Constitution, the Fourteenth Amendment of the United States Constitution, the laws of the United States, and in particular, Title 25 of the United States Code, the Treaty of Pt. Elliott, January 22, 1855 (12 Stat. 927), the Treaty with the Makah, January 31, 1855 (12 Stat. 939), and the Executive Order of July 2, 1872 (1 Kapp. 195). Jurisdiction is conferred upon the District Court by 28 U.S.C. §1362 and 28 U.S.C. §§2201 and 2202.

1.4 Three-Judge District Court.

Plaintiffs request the convening of a three-judge district court pursuant to 28 U.S.C. §2281-2284 for the reason that the prayer of the Complaint asks for interlocutory and permanent injunctions restraining enforcement of state statutes by restraining the action of a state officer upon the grounds of unconstitutionality of the state statutes.

1.5 Factual Averments.

Plaintiff tribes are sovereign Indian nations located

on Indian reservations within the geographical area of the State of Washington. Each plaintiff has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its reservation, and each ordinance has been approved by the Secretary of the Interior. Copies of the respective tobacco ordinances are attached hereto as Exhibits A, B and C and incorporated herein verbatim.

Pursuant to its ordinance, each plaintiff has established one or more tribal tobacco outlets on federal Indian trust land on its reservation under the control and jurisdiction of both tribal and federal regulations. The operator of each tribal tobacco outlet is licensed by his respective tribe and is a federally licensed Indian trader.

Cigarettes are purchased by plaintiff tribes with federally restricted tribal funds from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes are collected, the proceeds of which are used for tribal governmental purposes. Each plaintiff is authorized by the federal government and as a matter of its own inherent tribal sovereignty to sell cigarettes to non-Indians and each has authorized such sales in limited quantities of two cartons per sale to non-Indians in its ordinance.

Defendant State of Washington, by and through its Department of Revenue, has, over a period of eight years, attempted to tax cigarettes sold on plaintiffs' reservations pursuant to tribal and federal laws. On December 19, 1972, the Department of Revenue issued orders to tribal tobacco outlets on each reservation, assessing taxes alleged to be due under Chap. 82.24, RCW.

On April 11, 1973, unstamped cigarettes in the stream of interstate commerce and destined for the Lummi Indian Reservation were seized from the Bellingham warehouse of the Oregon-Nevada-California Freight Systems by agents of the Department of Revenue, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 12, 1973, a sealed truck of an interstate commerce carrier enroute to the Lummi Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and the contents seized, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 30, 1973, a sealed truck of an interstate commerce carrier enroute to the Colville Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and its contents were declared contraband, seized and declared forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

The State of Washington, through its Department of Revenue, has declared its intention to continue such seizures of unstamped cigarettes shipped from outside the State of Washington and destined for Indian reservations in the future.

1.6 Unconstitutional Burden on Indian Commerce.

The averred past and proposed actions of defendants State of Washington and the Department of Revenue, and RCW 82.24, as applied to plaintiffs, constitute unconstitutional burdens on Indian commerce in violation of the pre-emptive right of Congress to regulate such commerce stated in Article I, Sec. 8, Cl. 3 of the United States Constitution, and in violation of the Treaty of Pt. Elliott, the Treaty With The Makah, the Executive Order of July 2, 1872, decisions, statutes, rules and regulations of the United States and its courts, and in violation of the inherent tribal sovereignty of each plaintiff and its tobacco ordinance, rules and regulations.

1.7 Legal Basis for Plaintiffs' First Claim for Relief.

The legal basis for plaintiffs' first claim for relief is:

(a) *Tonasket Case* — On September 2, 1971, the Supreme Court of the State of Washington filed an Opinion in the case of *Tonasket v. State of Washington,*

No. 41640 [79 Wn.2d 607, 488 P.2d 281 (1971)]. In that case, the Washington Supreme Court declared that the cigarette excise tax requirements of Washington State law were applicable to cigarette sales on the Colville Indian Reservation. The case was appealed to the Supreme Court of the United States, No. 71-1031. On April 24, 1973, the United States Supreme Court issued a Per Curiam Order vacating the judgment of the Washington State Supreme Court and remanding the case back to the Supreme Court for reconsideration. Thus, the United States Supreme Court has failed to uphold the position of the State of Washington that its cigarette excise tax laws are applicable to a tribal tobacco outlet operated on the Colville Indian Reservation pursuant to a federally approved tribal tobacco ordinance. Other United States Supreme Court cases uphold the principle that Indian property on reservations is not subject to the taxing jurisdiction of the state.

(b) *Indian Commerce Clause* — Article I, Sec. 8, Cl. 3 of the United States Constitution is a grant to Congress of the pre-emptive power to regulate commerce with Indian tribes. The United States Supreme Court has interpreted this provision to mean that taxing and other legal relationships with Indians on reservations may be regulated only by Congress, that the states have no jurisdiction for imposition of their laws on Indian tribes unless such power is specifically granted by Congress, and that only Congress can determine what is contraband in the area of merchandising activities by Indian tribes.

(c) *Federal Statutes and Regulations* — Pursuant to its constitutional authority, Congress has enacted comprehensive federal statutes and regulations regarding Indian commerce, 25 U.S.C. §261, *et seq.*; 25 C.F.R. §251, *et seq.*, including the licensing and regulating of federal Indian traders. Thus Congress has pre-empted the area of Indian commerce under a philosophy of protection of Indians and tribes, and any attempt by the state to levy taxes upon commercial activities on reservations violates that exclusive federal pre-emption of Indian trading.

(d) *Tribal Sovereignty* — As tribes governed by federally approved Constitutions and By-laws, plaintiffs, in their quasi-sovereign capacity, have exercised their sovereign powers to tax and regulate commerce through enactment of tribal tobacco ordinances, making sale and distribution of all tobacco products on their reservations tribal enterprises generating necessary tax revenues for the tribal governmental entities. If the state may impose its cigarette excise tax on cigarettes sold on plaintiffs' reservations, any tribal tax regulating the same commercial activity is automatically eliminated, thus annihilating the sovereign power of plaintiffs to tax and regulate commercial activity on their reservations in violation of the specific provisions of their Constitutions and By-laws and federal law and policy.

(e) *General Allotment Act* — Under the provisions of the General Allotment Act, 24 Stat. 388 (1887), both tribal and allotted trust land on Indian reservations remains free from taxation, both state and federal, as long as it retains its trust status. Under the state excise tax scheme, remedies are provided for default in the payment of a state tax, including a lien on all real property of the taxpayer, RCW 82.32.210, RCW 82.32.240, and the county sheriff is commanded to levy upon and sell the taxpayer's real property to satisfy the lien. Such levies and liens violate the General Allotment Act, and decisions of the United States Supreme Court.

(g) *Public Law 83-280* — Public Law 83-280, 67 Stat. 588 (18 U.S.C. §1162, 28 U.S.C. §1360), provides in Sec. 2(b) and 4(b) that no state assuming Indian jurisdiction pursuant thereto is authorized to encumber or tax any trust or federally restricted real or personal property of an Indian or Indian tribe or regulate the use thereof in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto. The state excise tax scheme and the levies, liens and seizures being made thereunder by defendant State of Washington are direct violations of Sections 2(b) and 4(b) of Public Law 83-280.

(h) *Federal Trust Policy* — A central goal of federal policy underlying the trust status of Indian property is maximum profitability of Indian enterprises. Plaintiffs' tribal tobacco outlets operate on trust land and the title to all cigarettes purchased by plaintiffs remains federally restricted tribal trust property until sale to the ultimate consumer pursuant to plaintiffs' tobacco ordinances. Application of state excise taxes to such enterprises severely diminishes maximum profitability of the use of Indian trust land, thus frustrating federal Indian policy.

FOR A SECOND CLAIM FOR RELIEF against defendants, plaintiffs aver:

2.1 Parties and Jurisdiction.

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

2.2 Factual Averments.

Plaintiffs re-aver paragraph 1.5 of their First Claim for Relief.

2.3 Unconstitutional Burden on Interstate Commerce.

Defendants' past and proposed actions in stopping federally licensed, sealed trucks, engaged in interstate commerce, bringing Indian property from outside the state to Indian reservations and in attempting to tax such property are an unconstitutional burden on interstate commerce and infringe on the power of Congress to regulate such commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.

FOR A THIRD CLAIM FOR RELIEF against defendants, plaintiffs aver:

3.1 Parties and Jurisdiction.

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

3.2 Factual Averments.

Plaintiffs re-aver paragraph 1.5 above and incorporate it herein by reference.

3.3 Violation of Fourteenth Amendment.

In seizing plaintiffs' property as described above and in interfering with plaintiffs' right to sell to non-Indians pursuant to their tobacco ordinances and in accordance with state law, defendants are depriving plaintiffs of their property without due process of law and are denying plaintiffs the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

FOR A FOURTH CLAIM FOR RELIEF against defendants, plaintiffs aver:

4.1 Parties and Jurisdiction.

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

4.2 Factual Allegations.

Plaintiffs re-aver paragraph 1.5 of their First Claim for Relief.

4.3 Tribal Conformity with State Law.

Defendants have harassed and will continue to harass plaintiffs and have seized and will continue to seize their property despite the fact that plaintiffs' merchandising activities conform to the requirements of state cigarette excise tax laws, RCW 82.24 as amended by Chap. 157, Washington Laws, 1972, 1st Ex. Sess.

4.4 Legal Basis for Plaintiffs' Fourth Claim for Relief.

Sec. 6 of Chap. 157, Washington Law, 1972, 1st Ex. Sess. provides that a person who is authorized by this chapter to possess unstamped cigarettes in this state is not in violation of the excise tax law. It then defines "person authorized" as, inter alia, "any Indian tribal organization authorized to possess unstamped cigarettes." Plaintiffs, as

Indian tribes with governing bodies recognized by the Secretary of the Interior, are operating their tribal tobacco outlets under tobacco ordinances providing for the sale, taxation and distribution of said cigarettes, which ordinances have been approved by the Secretary of the Interior. Thus, these Indian tribal organizations have been authorized by their governing bodies and by the United States Government to possess unstamped cigarettes.

Additionally, Sec. 7 of the 1972 Act allows the acquisition and possession, by each Washington consumer of two cartons (400) of cigarettes at any single time, without incurring state tax liability. Plaintiffs' tobacco ordinances provide that sales to non-Indians are limited to two cartons per sale. Plaintiffs are therefore operating their tribal tobacco outlets in complete conformance with the state excise tax laws.

FOR A FIFTH CLAIM FOR RELIEF against defendant State of Washington, plaintiffs aver:

5.1 Parties and Jurisdiction.

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

5.2 Factual Allegations.

In 1957, purportedly pursuant to Public Law 83-280 (67 Stat. 588, 18 U.S.C. §1162, 28 U.S.C. §1360), the Legislature of the State of Washington enacted Chap. 240, Laws of 1957, by which the State of Washington attempted to provide means for its assumption of criminal and civil jurisdiction over Indians and Indian reservations in the State. In 1963, purportedly pursuant to Public Law 83-280, the Legislature of the State of Washington enacted Chap. 36, Laws of 1963, by which the State of Washington attempted to assume criminal and civil jurisdiction over all Indians and Indian tribes on trust and restricted lands in the State of Washington, including plaintiffs, in the following eight enumerated areas: Compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, depen-

dent children, operation of motor vehicles upon the public streets, alleys, roads and highways.

In 1965, purportedly pursuant to Chap. 37.12 RCW the Governor of the State of Washington issued a proclamation declaring assumption of full criminal and civil jurisdiction over the Confederated Tribes of the Colville Indian Reservation.

5.3 Invalidity of the Assumption of Jurisdiction by the State.

Sec. 6 of Public Law 83-280 requires that Article XXVI, Second Section of the Washington State Constitution by [*sic*] amended prerequisite to state assumption of Indian jurisdiction.

Article XXVI, Second Section, of the Constitution has never been amended. Chap. 240, Laws of 1957, and Chap. 36, Laws of 1963 (codified as Chap. 37.12 RCW) are invalid in that they violate Public Law 83-280, 67 Stat. 588 and 25 Stat. 676, the Enabling Act admitting the State of Washington into the Union; and are unconstitutional since they violate Article XXVI, Second Section, of the State Constitution and the due process clause of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

6.1 Declaring that the statutes, regulations and procedures and actions of the State of Washington and the Department of Revenue in taxing and seizing cigarettes being delivered to plaintiffs' reservations and the interference of the State of Washington and the Department of Revenue with the merchandising activities of plaintiffs on their reservations constitute:

(a) Violations of the Order of the United States Supreme Court in *Tonasket v. State of Washington, supra*;

(b) Unconstitutional interference with the regulation of Indian commerce;

(c) Interference in the area of the regulation of

trading on Indian reservations, which area has been exclusively pre-empted by Congress;

(d) Interference with the sovereignty of plaintiff tribes;

(e) An encumbrance on and interference with plaintiffs' trust property;

(f) Violation of federal policies with regard to Indian trust property;

(g) Unconstitutional burdens on interstate commerce;

(h) Unconstitutional deprivation of plaintiffs' property without due process of law and denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

6.2 Declaring that plaintiffs' merchandising and cigarette sale activities are not violative of Chap. 82.24 RCW, as amended.

6.3 Declaring that defendant State of Washington has no authority to enforce state criminal or civil laws against members of the plaintiff tribes and that Chap. 240, Laws of 1957 and Chap. 36, Laws of 1963 (now codified as Chap. 37.12 RCW) are invalid and unconstitutional.

6.4 Issuing interlocutory and permanent injunctions restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette excise taxes on sales of cigarettes on Indian reservations, seizing cigarettes on said reservations or enroute to said reservations through the State of Washington, attempting to influence cigarette wholesalers not to sell to plaintiffs, and in any way attempting to tax or interfere with the conduct of cigarette merchandising activities on plaintiffs' reservations.

6.5 Awarding damages in an amount not presently ascertainable but which will be proven at trial as compensation for cigarettes seized from and related costs incurred by plaintiff Colville Confederated Tribes.

6.6 Awarding damages in an amount not presently ascertainable but which will be proven at trial as

compensation for cigarettes seized from and related costs incurred by plaintiff Lummi Indian Tribe.

6.7 Awarding damages for lost tax revenues of plaintiff tribes in an amount not presently ascertainable but which will be proven at trial.

6.8 Awarding all costs of this action.

6.9 Awarding reasonable attorneys' fees in this action.

6.10 Awarding such other relief as the Court may deem proper.

DATED at Seattle, Washington this 16th day of May, 1973.

ZIONTZ, PIRTLE & MORISSET

By:/s/_____
Robert L. Pirtle

/s/_____
Barry D. Ernstoff

Of Attorneys for Plaintiffs

TEMPORARY RESTRAINING ORDER

Entered November 5, 1973
[Caption Omitted in Printing]

THIS MATTER having come on for hearing upon plaintiffs' Motion for Temporary Restraining Order, plaintiffs having appeared by and through their attorneys, Ziontz, Pirtle, Morisset & Ernstoff and Robert L. Pirtle, and defendants having appeared by and through their attorneys, Slade Gorton and William D. Dexter, Assistant Attorney General, the Court having heard the arguments of counsel and having considered the Verified Complaint, the affidavits of Mel Tonasket, Jim McKay, Joe Lawrence, Jr., Barry D. Ernstoff, and Robert L. Pirtle, as well as plaintiffs' Memorandum of Authorities, and affidavits and memoes of defendants the Court being fully advised in the premises, pursuant to 28 U.S.C. §2284, makes and enters the following

FINDINGS

1. Plaintiff tribes, as evidenced by affidavits of Mel Tonasket, Jim McKay and Joe Lawrence, Jr., urgently require the income and tax revenue from cigarette sales on plaintiff reservations pursuant to plaintiff tribes' federally approved tobacco ordinances, to continue tribally administered programs performing governmental functions on plaintiff reservations and will suffer serious set-backs in tribal programs resulting in damages to the economic and social health of plaintiff tribes and their members.

Based upon the foregoing Findings, it is hereby

ORDERED that during the pendency of this action or until a hearing and determination by the full three-judge Court of plaintiffs' Motion for Preliminary Injunction, or until otherwise ordered by the Court the State of Washington and George Kinnear, individually and as director of the Department of Revenue, State of Washington, their agents, employees, servants, officers and successors, and all persons in active consort or participa-

tion with them, are hereby restrained from enforcing Washington state statutes and regulations regarding cigarettes destined for plaintiff Indian tribes or subordinate tribal organizations, by licensed carrier in interstate commerce and their possession, distribution and ultimate retail sale through tribal tobacco outlets on trust land within the exterior boundaries of the Colville, Lummi and Makah Indian Reservations pursuant to the respective tribal tobacco ordinances, and it is further

ORDERED that plaintiff tribes shall post a bond in the total sum of $10,000, and it is further

ORDERED that defendants' Motion for a Temporary Restraining Order is hereby denied.

DATED this 5th day of November, 1973.

/s/_____
Charles L. Powell
United States District Judge

Presented by:

/s/_____
Robert L. Pirtle of
Attorneys for Plaintiffs

* * * *

PRELIMINARY INJUNCTION

Entered September 6, 1974
[Caption Omitted in Printing]

THIS MATTER having come on for hearing upon plaintiffs' Motion for Preliminary Injunction, and on plaintiffs' Complaint for Declaratory Judgment, Injunction and Damages, plaintiffs having appeared by and through their attorneys, Ziontz, Pirtle, Morisset & Ernstoff and Robert L. Pirtle, and defendants having appeared by and through their attorneys, Slade Gorton and William D. Dexter, Assistant Attorney General, the Court having heard the arguments of counsel and having considered the Complaint, the affidavits and records herein and briefs of all parties, the Court being fully advised in the premises, and it appearing to the Court that in all probability the plaintiffs will prevail upon the merits, and that the Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe and Makah Indian Tribe and their tribal tobacco outlets have suffered and will continue to suffer serious losses of revenue constituting irreparable damage, all of which necessitates the entry of a preliminary injunction, and it being stipulated by the parties that sufficient facts have been shown to exist by the record herein to support this order, which facts are hereby adopted as Findings of Fact herein, it is now

ORDERED that defendants, State of Washington and the Director of the Department of Revenue, State of Washington, and their agents, employees, servants, officers and successors, and all persons in active concert or participation with them, are hereby restrained from enforcing Washington State statutes and regulations regarding cigarettes against the plaintiff Indian tribes or their subordinate tribal organizations on any cigarettes or tobacco products being shipped or delivered to their reservations by licensed carriers in interstate commerce, and the possession, distribution and sale of such cigarettes by such plaintiff Indian tribes and their subordinate tribal

organizations on trust land within the exterior boundaries of the Colville, Lummi and Makah Indian Reservations pursuant to the respective Tribal Tobacco Ordinances, or amendments thereto, pending the determination of this action, or until further order of this Court.

DONE BY THE COURT this 6th day of September, 1974.

/s/_____
John F. Kilkenny
United States Circuit Judge

/s/_____
William G. East
United States District Judge

/s/_____
Howard B. Turrentine
United States District Judge

* * * *

AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND DAMAGES

Filed January 24, 1975
[Caption omitted in printing]

FOR A FIRST CLAIM FOR RELIEF against defendant, plaintiffs aver:

1.1 Plaintiffs.

(a) Plaintiff Colville Confederated Tribes is a sovereign Indian tribe recognized by the United States Government and situate on the Colville Indian Reservation in the Eastern District of Washington. The Tribes are governed by a Constitution and By-laws approved by the Secretary of the Interior on December 26, 1938.

(b) Plaintiff Lummi Indian Tribe is a sovereign Indian tribe, recognized by the United States Government and situate on the Lummi Indian Reservation in the Western District of Washington. The Tribe is governed by a Constitution and By-laws approved by the Secretary of the Interior on April 10, 1970.

(c) Plaintiff Makah Indian Tribe is a sovereign Indian tribe recognized by the United States Government and situate on the Makah Indian Reservation in the Western District of Washington. The Tribe is governed by a Constitution and By-laws approved by the Secretary of the Interior on May 16, 1936.

1.2 Defendants.

Defendants are the State of Washington and the Director of its Department of Revenue, which is charged with the duty under state law of collecting and enforcing the tax statutes of the state.

1.3 Jurisdiction.

This is an action by three Indian tribes with governing bodies duly recognized by the Secretary of the

Interior, and in which the matter in controversy arises under Article I, Sec. 8, Cl. 3 of the United States Constitution, the Fourteenth Amendment of the United States Constitution, the laws of the United States, and in particular, Title 25 of the United States Code, the Treaty of Point Elliott, January 22, 1855 (12 Stat. 927), the Treaty with the Makah, January 31, 1855 (12 Stat. 939), and the Executive Order of July 2, 1872 (1 Kapp. 195). Jurisdiction is conferred upon the District Court by 28 U.S.C. §1362 and 28 U.S.C. §§2201 and 2202.

1.4 Three-Judge District Court.

Plaintiffs request the convening of a three-judge district court pursuant to 28 U.S.C. §§2281-2284 for the reason that the prayer of the Complaint asks for interlocutory and permanent injunctions restraining enforcement of state statutes by restraining the action of a state officer upon the grounds of unconstitutionality of the state statutes.

1.5 Factual Averments.

Plaintiff tribes are sovereign Indian nations located on Indian reservations within the geographical area of the State of Washington. Plaintiff tribes are units of local government governing their respective reservations. They have always enjoyed immunity from state taxation and jurisdiction through federal statute and policy. The State of Washington has recently begun to attempt to assert its taxation jurisdiction against plaintiff tribes, their reservations and members in the following manners:

(a) *Cigarette Tax.* Each plaintiff tribe has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its reservation. Pursuant to its ordinance, each plaintiff has established one or more tribal tobacco outlets on federal Indian trust land on its reservation under the control and jurisdiction of both tribal and federal regulations. The operator of each tribal tobacco outlet is licensed by his respective tribe and is a federally licensed Indian trader.

Cigarettes are purchased by plaintiff tribes with federally restricted tribal funds from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes are collected, the proceeds of which are used for tribal governmental purposes. Each plaintiff is authorized by the federal government and as a matter of its own inherent Tribal sovereignty to sell cigarettes to non-Indians, and each has authorized such sales in limited quantities of three cartons per sale to non-Indians in its ordinance.

Defendant State of Washington, by and through its Department of Revenue, has, over a period of eight years, attempted to tax cigarettes sold on plaintiffs' reservations pursuant to tribal and federal laws. On December 19, 1972, the Department of Revenue issued orders to tribal tobacco outlets on each reservation, assessing taxes alleged to be due under Ch. 82.24, RCW.

On April 11, 1973, unstamped cigarettes in the stream of interstate commerce and destined for the Lummi Indian Reservation were seized from the Bellingham warehouse of the Oregon-Nevada-California Freight Systems by agents of the Department of Revenue, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 12, 1973, a sealed truck of an interstate commerce carrier enroute to the Lummi Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and the contents seized, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 30, 1973, and on October 8, 1973, sealed trucks of an interstate commerce carrier enroute to the Colville Indian Reservation, containing unstamped cigarettes, were stopped by agents of the Department of Revenue and their contents were declared contraband, seized and declared forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

The State of Washington, through its tax laws, allows the sale of cigarettes by recognized Indian tribes only to a maximum of two cartons per sale to non-Indians.

(b) *Business and Occupation Tax.* Under WAC 458-20-192, revised December 16, 1974, the State of Washington attempts to assess business and occupation tax on businesses conducted by Indians on lands within the exterior boundaries of Indian reservations. Some of plaintiff tribes assess their own business and occupation taxes on their reservations for purposes of additional tribal revenues.

(c) *Use Tax.* Under WAC 458-20-192, the State of Washington attempts to assess use tax upon the use of tangible personal property located upon lands within the exterior boundaries of the respective Indian reservations and used by Indians to produce income in line with the federal policy of encouraging Indians to become economically self-sufficient on their reservations. Included in this use tax is a tax on motor vehicles and trailers sold to Indians and used within the exterior boundaries of their reservations.

(d) *Definitional Violations.* Under WAC 458-20-192, the State of Washington has defined the term "Indian Reservation" as not including "lands the title to which has been allotted in fee simple, or which have been sold, or the alienation of which is unrestricted, even though such lands may be within the boundaries of an Indian reservation as originally set aside". In addition, in the definition section of the revised rule, the State asserts complete taxing jurisdiction on those reservations over which the State has assumed criminal and civil jurisdiction under Public Law 83-280.

1.6 Unconstitutional Burden on Indian Commerce.

The averred past and proposed actions of the defendants State of Washington and Department of Revenue, and Washington state taxing statutes and regulations, as applied to plaintiffs, constitute unconstitutional burdens on Indian commerce in violation of the pre-emptive right of Congress to regulate such commerce stated in Article I, Sec. 8, Cl. 3 of the United States Constitution, and in violation of the Treaty of Point Elliott, the Treaty with the Makah, the Executive Order of July 2, 1872, decisions, statutes, rules and regulations of the United States and its courts, and in violation of the inherent tribal sovereignty of each plaintiff and its ordinances, rules, and regulations.

1.7 Legal Basis for Plaintiffs' First Claim for Relief.

(a) *Recent case law* — In *Mahoney v. Idaho State Tax Commission,* No. 11016 (September 5, 1973), the Supreme Court of the State of Idaho upheld a judgment restraining the State of Idaho from restraining the State of Idaho from [*sic*] taxing the sale of cigarettes by members of an Indian tribe to non-Indians. Cert. was denied by the United States Supreme Court, 43 L.W. 3356 (December 23, 1974).

In *Walker River Paiute Tribe v. Sheehan,* Civil No. R-2888 — BRT, a federal district court in Nevada enjoined the application of Nevada state excise tax statutes to an Indian reservation cigarette business. The decision of the court in that case was not appealed.

(b) *Indian commerce clause* — Article I, Sec. 8, Cl. 3 of the United States Constitution is a grant to Congress of the pre-emptive power to regulate commerce with Indian tribes. The United States Supreme Court has interpreted this provision to mean that taxing and other legal relationships with Indians on reservations may be regulated only by Congress, that the States have no jurisdiction for imposition of their laws on Indian tribes unless such power is specifically granted by Congress, and that only Congress can determine what is contraband in the area of merchandising activities by Indian tribes.

(c) *Federal Statutes and Regulations* — Pursuant to its constitutional authority, Congress has enacted comprehensive federal statutes and regulations regarding Indian

commerce, 25 U.S.C. §261, *et seq.*; 25 C.F.R. §251, *et seq.*, including the licensing and regulating of federal Indian traders. Thus Congress has pre-empted the area of Indian commerce under a philosophy of protection of Indians and tribes, and any attempt by the state to levy taxes upon commercial activities on reservations violates that exclusive federal pre-emption of Indian trading. In addition, under other federal statutes including the Buck Act, 4 U.S.C. §104, *et seq.*, Indians have specific immunity from the imposition of state taxes.

(d) *Tribal Sovereignty* — As tribes governed by federally approved Constitutions and By-laws, plaintiffs, in their quasi-sovereign capacity, have exercised their sovereign powers to tax and regulate commerce through enactment of tribal taxing ordinances, such as tribal tobacco ordinances, making sale and distribution of all tobacco products on their reservations' tribal enterprises generating necessary tax revenues for the tribal governmental entities. If the state may impose its taxes on plaintiffs' reservations, any tribal tax regulating the same activity is automatically eliminated, thus annihilating the sovereign power of plaintiffs to tax and regulate activities on their reservations and in violation of the specific provisions of their constitutions and by-laws and federal law and policy.

(e) *General Allotment Act* — Under the provisions of the General Allotment Act, 24 Stat. 388 (1887), both tribal and allotted trust land on Indian reservations remains free from taxation, both state and federal, as long as it retains its trust status. Under the state tax schemes, remedies are provided for default in the payment of a state tax, including liens on all real property of the taxpayer, and the county sheriff is commanded to levy upon and sell the taxpayer's property to satisfy the lien. Such levies and liens violate the General Allotment Act, and decisions of the United States Supreme Court.

(g) *Public Law 83-280* — Public Law 83-280, 67 Stat. 588 (18 U.S.C. §1162, 28 U.S.C. §1360), provides in Sec. 2(b) and 4(b) that no state assuming Indian jurisdiction

pursuant thereto is authorized to encumber or tax any trust or federally restricted real or personal property of an Indian or Indian tribe or regulate the use thereof in a manner inconcistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto. The state tax schemes and the levies, liens and seizures being made thereunder by defendant State of Washington are direct violations of Sections 2(b) and 4(b) of Public Law 83-280.

(h) *Federal Trust Policy* — A central goal of federal policy is the maximum profitability of Indian enterprises and tribes. Plaintiffs' tribal tobacco outlets, other tribal taxes, and freedom from state taxation all contribute to the profitability of the use of Indian lands and reservations. Application of state taxes to such individuals, lands, enterprises and property would diminish the maximum profitability of their use, thus frustrating federal Indian policy.

For A Second Claim for Relief against defendants, plaintiffs aver:

2.1 Parties and Jurisdiction.

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

2.2 Factual Averments.

Plaintiffs re-aver paragraph 1.5 of their First Claim for Relief.

2.3 Unconstitutional Burden on Interstate Commerce.

Defendants' past and proposed actions in stopping federally licensed, sealed trucks, engaged in interstate commerce, bringing Indian property from outside the state to Indian reservations and in attempting to tax such property are an unconstitutional burden on interstate commerce and infringe on the power of Congress to regulate such commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.

FOR A THIRD CLAIM FOR RELIEF against defendants, plaintiffs aver:

3.1 Parties and Jurisdiction.

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

3.2 Factual Averments.

Plaintiffs re-aver paragraph 1.5 above and incorporate it herein by reference.

3.3 Violation of Fourteenth Amendment.

In seizing plaintiffs' property as described above and in attempting to levy on Indian property under state tax laws, defendants are depriving plaintiffs of their property without due process of law and are denying plaintiffs equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

FOR A FOURTH CLAIM FOR RELIEF against defendant State of Washington, plaintiffs aver:

4.1 Parties and Jurisdiction.

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

4.2 Factual Allegations.

In 1957, purportedly pursuant to Public Law 83-280 (67 Stat. 588, 18 U.S.C. §§1162, 28 U.S.C. §1360), the Legislature of the State of Washington enacted Chap. 240, Laws of 1957, by which the State of Washington attempted to provide means for its assumption of criminal and civil jurisdiction over Indians and Indian reservations in the State. In 1963, purportedly pursuant to Public Law 83-280, the Legislature of the State of Washington enacted Chap. 36, Laws of 1963, by which the State of Washington attempted to assume criminal and civil jurisdiction over all Indians and Indian tribes on trust and restricted lands in the State of Washington, including plaintiffs, in the following eight enumerated areas: Compulsory school

attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, operation of motor vehicles upon the public streets, alleys, roads and highways.

In 1965, purportedly pursuant to Chap. 37.12 RCW the Governor of the State of Washington issued a proclamation declaring assumption of full criminal and civil jurisdiction over the Confederated Tribes of the Colville Indian Reservation.

4.3 Invalidity of the Assumption of Jurisdiction by the State.

Sec. 6 of Public Law 83-280 requires that Article XXVI, Second Section of the Washington State Constitution be amended prerequisite to state assumption of Indian jurisdiction.

Article XXVI, Second Section, of the Constitution has never been amended. Chap. 240, Laws of 1957, and Chap. 36, Laws of 1963 (codified as Chap. 37.12 RCW) are invalid in that they violate Public Law 83-280, 67 Stat. 588 and 25 Stat. 676, the Enabling Act admitting the State of Washington into the Union; and are unconstitutional since they violate Article XXVI, Second Section, of the State Constitution and the due process clause of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

5.1 Declaring that the statutes, regulations and procedures and actions of the State of Washington and the Department of Revenue in attempting to impose cigarette, business and occupation, and use taxes and in attempting to define Indian reservations under WAC 458-20-192 and in attempting to use Public Law 83-280 as a grant of full taxing jurisdiction constitute:

(a) Unconstitutional interference with the regulation of Indian commerce;

(b) Interference in the area of the regulation of trading on Indian reservations, which area has been exclusively pre-empted by Congress;

(c) Interference with the sovereignty of plaintiff tribes;

(d) An encumbrance on and interference with plaintiffs' property;

(e) Violation of federal policies with regard to Indian trust property;

(f) Unconstitutional burdens on interstate commerce;

(g) Unconstitutional deprivation of plaintiffs' property without due process of law and denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

5.2 Declaring that defendant State of Washington has no authority to enforce state criminal or civil laws against members of the plaintiff tribes and that Chap. 240, Laws of 1957 and Chap. 36, Laws of 1963 (now codified as Chap. 37.12 RCW) are invalid and unconstitutional.

5.3 Issuing interlocutory and permanent injunctions restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette, business and occupation, and use taxes on Indian reservations, seizing any property on said reservations or enroute to said reservations through the State of Washington, and in any way attempting to tax or interfere with the conduct of business activities on plaintiffs' reservations.

5.4 Awarding damages in an amount not presently ascertainable but which will be proven at trial as compensation for cigarettes seized from and related costs incurred by plaintiff Colville Confederated Tribes.

5.5 Awarding damages in an amount not presently ascertainable but which will be proven at trial as compensation for cigarettes seized from and related costs incurred by plaintiff Lummi Indian Tribe.

5.6 Awarding damages for lost tax revenues of plaintiff tribes in an amount not presently ascertainable but which will be proven at trial.

5.7 Awarding all costs of this action.

5.8 Awarding reasonable attorneys' fees in this action.

5.9 Awarding such other relief as the Court may deem proper.

DATED at Seattle, Washington this 3rd day of January, 1975.

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

By:/s/_____
Robert L. Pirtle

/s/_____
Barry D. Ernstoff

Of Attorneys for Plaintiffs.

PRE-TRIAL ORDER

Filed March 28, 1977
[Caption omitted in printing]

Pursuant to the Order entered herein on December 14, 1976, the plaintiffs, Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe and Makah Indian Tribe, represented by Ziontz, Pirtle, Morisset, Ernstoff & Chestnut and Robert L. Pirtle and Steven S. Anderson, and defendants, State of Washington, Charles Hodde, Director of the State of Washington, Department of Revenue, Jack G. Nelson, Director of the State of Washington, Department of Motor Vehicles, Robert S. O'Brien, Washington State Treasurer, represented by Slade Gorton, Attorney General, Richard H. Holmquist, Senior Assistant Attorney General, and Matthew J. Coyle, Assistant Attorney General, have prepared and filed with the Court this Pre-Trial Order, defining the factual and legal issues to be heard by the three-judge panel convened under 28 U.S.C. §2281.

1. JURISDICTION AND NATURE OF PROCEEDINGS.

1.1 **Jurisdiction.** This Court has jurisdiction of this cause pursuant to 28 U.S.C. §1362 since plaintiffs are Indian tribes recognized by the federal government, and pursuant to 28 U.S.C. §2201 and §2202. Jurisdiction of this Court is not defeated with respect to plaintiff Tribes by 28 U.S.C. §1341.

1.2 **Three-Judge Court.** A three-judge Federal District Court was convened pursuant to 28 U.S.C. §2281 on June 18, 1973, on the ground that plaintiffs' complaint seeks to enjoin the enforcement of state statutes as in violation of the Commerce Clause, Art. I, Sec. 8, Cl. 3 and the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

1.3 **Jurisdictional Basis.** This is an action by three Indian tribes with governing bodies duly recognized by the Secretary of the Interior, and in which the matter in controversy arises under Art. I, Sec. 8, Cl. 3 and the due process and equal protection clauses of the 14th Amendment of the United States Constitution, the laws of the United States and in particular Title 25 of the United States Code, the Treaty of Point Elliott, January 22, 1855 (12 Stat. 927), the Treaty with the Makah, January 31, 1855 (12 Stat. 939), and the Colville Executive Order of July 2, 1872 (1 Kapp. 195).

1.4 **Relief Sought by Plaintiffs.** Plaintiffs seek relief as follows:

1.4.1 **State Indian Jurisdiction.** Declaratory judgment and injunctive relief against the exercise by the State of Washington of jurisdiction over the three plaintiff Tribes, their enrolled members and their respective Reservations pursuant to Ch. 240, Laws of 1957 and Ch. 36, Laws of 1963 (now codified as RCW Ch. 37.12) as in violation of the United States Constitution and federal law.

1.4.2 **State Cigarette and Tobacco Products Taxes.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in the imposition of state cigarette and tobacco products taxes on cigarettes and tobacco products shipped from outside the State of Washington to tribal cigarette enterprises on the Colville, Lummi, and Makah Indian Reservations, consigned to the respective Tribes and intended for sale by tribal tobacco outlets on trust lands within the three Reservations.

1.4.3 **Seizure of Shipments to Plaintiff Tribes.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in seizing as contraband, cigarettes and tobacco products being shipped from outside the State of

Washington to tribal cigarette enterprises on the Colville and Lummi Indian Reservations, consigned to the respective Tribes and intended for sale by tribal tobacco outlets on trust lands within the two respective Reservations.

1.4.4 **Threatened Seizure of Shipments to Plaintiff Tribes.** Declaratory judgment and injunctive relief against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband, cigarettes and tobacco products being shipped from outside the State of Washington to tribal cigarette enterprises on the Colville, Lummi and Makah Indian Reservations, consigned to the respective Tribes and intended for sale by tribal tobacco outlets on trust lands within the three respective Reservations.

1.4.5 **Threatened Seizure of Property of Tribal Cigarette Outlet Operators.** Declaratory judgment and injunctive relief against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to levy upon and seize real and personal property of the licensed operators of tribal cigarette outlets of the three plaintiff Tribes to satisfy state cigarette and tobacco products taxes assessed against them.

1.4.6 **State Motor Vehicle Excise Tax.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in imposing state motor vehicle excise taxes upon motor vehicles owned by the plaintiff Tribes and their members residing within the exterior boundaries of their respective Reservations.

1.4.7 **State Mobile Home, Travel Trailer and Camper Tax.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in imposing state mobile home, travel

trailer and camper taxes upon mobile homes, travel trailers and campers owned by the plaintiff Tribes and their members residing within the exterior boundaries of their respective Reservations.

1.5 **Relief Sought by Defendants.** Defendants seek relief as follows:

1.5.1 **State Statutes Applicable.** Declaratory judgment that Washington State statutes pertaining to taxation of cigarettes, tobacco products, and retail sales are applicable to licensed retailers of the plaintiff Tribes as administered by the defendants in conformity with WAC 458-12-192 (Rule 192) as adopted on November 12, 1976.

1.5.2 **Require Tribes to Collect.** Declaratory judgment that defendants may require the plaintiff Tribes or their licensed tobacco outlet operators to collect and remit cigarette, tobacco products, and sales taxes imposed upon non-members of the Tribes with respect to purchases at retail from the Tribes or their licensed tobacco products outlet operators at locations within the exterior boundaries of their respective Reservations.

2. ADMITTED FACTS

The parties hereto, by and through their counsel, stipulate and agree that the facts set forth herein are true and correct, and that several documents attached as exhibits hereto are true, accurate, and conformed copies of the originals thereof, and may be received herein without further authentication, subject to the right of either party to object to any facts herein stipulated to or any portion of any exhibit hereto attached on the grounds of materiality or relevancy.

2.1 **Plaintiff Colville Confederated Tribes.** Plaintiff Colville Confederated Tribes is a sovereign Indian tribe, recognized by the United States government, and consisting of approximately 5,837 members. The Colville Indian Reservation encompasses 1.3 million acres and is governed by the Colville Business Council under a

Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938.

2.2 **Plaintiff Lummi Indian Tribe.** Plaintiff Lummi Indian Tribe is a sovereign Indian tribe, recognized by the United States government, and consisting of approximately 2,000 members. The Lummi Indian Reservation encompasses 7,319 acres and is governed by the Lummi Indian Business Council under a Constitution and By-Laws approved by the Secretary of the Interior on April 10, 1970.

2.3 **Plaintiff Makah Indian Tribe.** Plaintiff Makah Indian Tribe is a sovereign Indian tribe, recognized by the United States government, and consisting of approximately 1,000 members. The Makah Indian Reservation encompasses approximately 28,000 acres and is governed by the Makah Tribal Council under a Constitution and By-Laws approved by the Secretary of the Interior on May 16, 1936.

2.4 **Location of Reservations.** Colville, Lummi and Makah Indian Reservations are located within the geographical area of the State of Washington.

2.5 **Tribal Tobacco Ordinances.** Each plaintiff has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its Reservation, and each ordinance has been approved by the Secretary of the Interior. Pursuant to its ordinance, each plaintiff has established one or more tribal tobacco outlets on federal Indian trust land on its Reservation under the control and jurisdiction of both tribal and federal regulations.

All cigarettes and tobacco products purchased by the plaintiff Tribes pursuant to their tobacco ordinances are paid for with federally-restricted tribal funds from an Individual Indian Money Account in the Bureau of Indian Affairs Agency serving the respective Reservation pursuant to 25 CFR Part 104, entitled "Individual Indian Money Accounts".

All cigarettes and tobacco products are purchased

from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the respective Reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes fixed by the tribal or business council, are collected. The tribal cigarette tax amounts are as follows:

Indian Tribe	**Cigarette Tax**
Colville Indian Tribe	$ .04 per package
Lummi Indian Tribe	$ .05 per package
Makah Indian Tribe	$ .05 per package.

The tribal tobacco ordinances provide that the cigarette tax imposed by the Tribes is a tax upon distribution of cigarettes on the Reservation by the respective Tribes through tribal tobacco outlets.

The entire stock of tobacco products distributed by the plaintiff Tribes pursuant to their tribal tobacco ordinances remain tribal property, owned and possessed by the respective Tribes until sale to the ultimate consumer. Payment to the respective Tribes of the wholesale distribution price provided in the ordinances by the operators of tribal tobacco outlets entitle the operators to custody of distributed tobacco products until sale to the ultimate consumer.

The operator of each tribal tobacco outlet is licensed by the respective Tribe and manages the tribally-owned tobacco business in the outlet as a tribal employee. Simultaneously, the operator of each tribal tobacco outlet except the Makah Resort manages his own business, selling a variety of merchandise at retail, including Indian jewelry, baskets, other Indian art, soft drinks and sundries. Business enterprises of the operators of tribal tobacco outlets other than the tobacco business are owned by the operators themselves.

The Colville and Lummi Tribes furnish the operators of their tribal tobacco outlets only with cigarettes and tobacco products pursuant to their tribal ordinances. The operators themselves are required to furnish working

capital and pay all business expenses. As remuneration for managing a tribal tobacco outlet, each operator is entitled to retain the gross revenue derived from sale of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective tribe.

2.6 **Federal Trader's Licenses.** The operator of each tribal tobacco outlet is a federally-licensed Indian trader. In addition, the wholesaler of cigarettes purchased by the three tribal tobacco enterprises is Collins and Wilmes Cigar Company, Portland, Oregon, which is also a federally-licensed Indian trader. Indian trader's licenses issued to the operators of tribal tobacco outlets and the wholesaler in Oregon are issued by the Superintendents of the Bureau of Indian Affairs Agencies serving the respective Reservations pursuant to Secretarial Order No. 2508 of the Secretary of the Interior.

2.7 **State Cigarette Tax Assessments.** Defendant State of Washington, by and through its Department of Revenue, has, over a period of nine years, attempted to tax cigarettes sold by Indians on plaintiffs' reservations. On December 19, 1972, the Department of Revenue issued orders to tribal tobacco outlets on each reservation assessing taxes alleged to be due under RCW Ch. 82.24.

2.8 **State Seizure of Lummi Cigarettes.** On April 11, 1973, unstamped cigarettes in the stream of interstate commerce and destined for the Lummi Indian Reservation were seized from the Bellingham warehouse of the Oregon-Nevada-California Freight Systems by agents of the Department of Revenue, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250. On April 12, 1973, a sealed truck of an interstate commerce carrier enroute to the Lummi Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and the contents seized, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250. The wholesale

value of the cigarettes, plus the amount of tribal taxes which would have been collected, amounts to $11,640.50.

2.9 **State Seizure of Colville Cigarettes.** On April 30, 1973, a sealed truck of an interstate commerce carrier enroute to the Colville Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and its contents were seized, declared contraband, and forfeited pursuant to RCW 82.24.130 and RCW 82.24.350. The wholesale value of the cigarettes, plus the amount of tribal taxes wich would have been collected, amounts to $1,488.00.

2.10 **State Intention to Continue Seizures.** The State of Washington, through its Department of Revenue, has declared its intention to continue such seizures of unstamped cigarettes shipped from outside the State of Washington and destined for Indian reservations in the future.

2.11 **Colville Tobacco Outlets.** The following tobacco outlets are presently licensed by the Colville Business Council pursuant to the Tribal ordinance to sell cigarettes on the Colville Indian Reservation:

1) Dave Roberts
   Smokeshop
   Brewster, Washington

2) Leonard Tonasket
   Stogey Shop
   East Omak, Washington

3) Dawn Leonard
   Widespot Smokeshack
   Coulee Dam, Washington

4) Florence Desautel
   Alpine Smokeshack
   Elmer City, Washington

5) Harry Martin
   Keller Smokeshack
   Keller, Washington

6) Leona Seastrom
Twin Lakes Tavern
Inchelium, Washington

7) Jack Charbonneau
Rainbow Beach Resort
Inchelium, Washington

8) Colville Trading Post
(Tribally Owned)
Nespelem, Washington

9) Watt
Cache Creek Junction Smokeshack
Keller, Washington

10) Cook
Okanogan Smokeshack
Okanogan, Washington

11) North Twin Resort
(Tribally Owned)
Inchelium, Washington

12) Inchelium Community Store
(Tribally Owned)
Inchelium, Washington

13) Nancy Anderson
NC Smokeshack
Bridgeport, Washington

14) Keller Store
(Tribally Owned)
Keller, Washington

The tribal tobacco outlets and the tribal cigarette warehouse employ 53 enrolled members of the Tribe full-time.

2.12 **Colville Tribal Programs.** The Colville Tribes administer tribal governmental programs in many areas including the following:

Revolving Credit Loan Program
Fish and Wildlife Program
Maternal Child Health Program
Community Health Representatives
Range Land Improvement

Timber Stand Improvement
Day Care Center
Alcohol Rehabilitation Program
Housing Improvement Program
Community Centers
Trading Post
Burial Account
Aid to Fire Victims
Tribal Scholarship Program
Paschal Sherman School
Twin Lakes Youth Camp
Parole and Probation Program
Adult Education Program
Employment Assistance Office
Tribal Tribune
Water Inventory
Women and Infant Care
Transportation for the Elderly
Senior Citizens Food Program

2.13 **Colville Tax Revenues.** The Colville Tobacco Enterprise has grossed tax revenues since its inception approximately as follows:

Year	Revenue
1972	$ 3,845
1973	64,890
1974	56,913
1975	93,617
1976	140,114

Revenues generated in the past have served as needed capital for establishing The Trading Post, a grocery, at Nespelem, on the Reservation. Present plans of the Colville Tribes for use of tribal cigarette tax revenues specifically include the providing of capital for economic enterprises for tribal members, administrative costs of the Paschal Sherman School, assistance programs for post-graduate college training of tribal members and capital for the programs described in Paragraph 2.12 above.

2.14 **Colville Unemployment.** Unemployment on the Colville Indian Reservation is approximately 33% of the available work force. The Colville Business Council is

anxious to take every step to create employment on the Reservation in meaningful tribal enterprises which will result in tribal tax revenues as well.

2.15 **Lummi Tobacco Outlets.** The following tobacco outlets are presently licensed by the Lummi Indian Business Council to sell cigarettes on the Lummi Indian Reservation:

1) Robert Finkbonner
2031 Lummi View Drive
Bellingham, WA 98248

2) Mary Kinley
4373 Lummi Shore Road
Ferndale, WA 98248

3) Ray Morris
1463 Country Lane
Bellingham, WA 98225

4) Henry Hillaire
4895 Ferndale Road
Ferndale, WA 98248

5) Dennis Finkbonner
4595 Sucia Drive
Ferndale, WA 98248

6) Fran James
4339 Lummi Shore Road
Ferndale, WA 98248

The tribal tobacco outlets employ 11 enrolled members of the Tribe full time.

2.16 **Lummi Tribal Programs.** The Lummi Indian Business Council administers tribal governmental programs in many areas including the following:

Health Service Unit
Community Action Program
Alcoholism Program
Services Integration Program
Public Assistance Demonstration Program
Housing Authority
Tribal Administration

Senior Citizens
History and Culture Program
Reservation Planning
Sanitation Engineering Program
Tribal Affairs Management
Day Care Center
Youth Recreation
Criminal Justice and Tribal Court
Legal Assistance
Land Acquisition
Water Rights
Literary Journal
Adult Education
Tribal Training Programs
Mental Health Representative

2.17 **Lummi Tax Revenues.** The Lummi Tobacco Enterprise has grossed tax revenues since its inception as follows:

Year	Revenue
1973	$10,274
1974	14,141
1975	17,028
1976	15,000 (estimate)

The Lummi Indian Tribe is presently dedicated to a program of development of industry on the Reservation and improvement of the economic well-being of its members. Cigarette tax revenues constitute a significant portion of the operating revenues of the Lummi Indian Tribe and are used as operating capital on cost reimbursable programs such as Head Start, child and senior citizen nutrition programs and alcoholism programs. At the present time revenues from the cigarette tax are also used to pay tribal attorney's fees.

2.18 **Makah Tobacco Outlets.** Pursuant to its tribal tobacco ordinance, the Makah Indian Tribe operates only one tribal outlet at the Makah Resort, a resort totally owned and operated by the Makah Indian Tribe on the

Reservation. The operator of the Makah Resort is a salaried employee of the Makah Tribe and the business of the Makah Resort and its tobacco business are totally owned and financed by the Makah Indian Tribe.

2.19 **Makah Tribal Programs.** The Makah Indian Tribe administers tribal governmental programs in many areas including the following:

Juvenile Rehabilitation Center
Sewer System
Probation & Parole
Criminal Justice & Tribal Court
EDA Program Planning
Youth Program
Culture Program
Economic Employment Assistance
701 Planning
Demographic Survey
Community Health Representative
Community Action Program
Title IV
Education
Cemetery and Burial
Fire Department
Sanitation Service
Other Education Programs
Roads and Trail Maintenance
Building Maintenance
Land Purchase
Senior Citizens
Tribal Pier
Fishing Boat Program
Waterfront Development
Television Program
Airport Matching
Tribal Administration

In addition, the Tribe currently has in various stages of proposal and preparation a tribal fish hatchery for

which some federal matching funds have already been received, a local airport, a tribal museum, a fish processing plant, a cannery, a large-scale timber development program utilizing tribal members and a tribal sawmill.

The Makah Tribal Council employs approximately 48 enrolled tribal members in administrative, CAP, Head-start, maintenance, custodial and other positions in the tribal programs.

2.20 **Makah Tax Revenues.** The Makah Tobacco Enterprise has grossed tax revenues since its inception as follows:

Year	Revenue
1973	$1,246.00
1974	3,860.00
1975	3,820.00
1976	4,562.00

The Makah Tribal Council has depended upon tribal cigarette taxes to provide funds to be used for all tribally administered programs from provision for school lunches for grade school children to scholarship funds for college education for enrolled members.

2.21 **Makah Unemployment.** Unemployment on the Makah Indian Reservation is approximately 60% of the working force. The Makah Tribal Council is anxious to take every step to create employment on the Reservation and needs every possible source of revenue to provide for programs.

2.22 **State Intention to Tax Motor Vehicles, Mobile Homes, Travel Trailers and Campers.** On November 12, 1976 the plaintiff Tribes were advised by Mr. R. H. Munzinger, Senior Assistant Director for Excise Taxes, Washington Department of Revenue, that WAC 458-20-192 (Rule 192) had been adopted by the Department of Revenue on November 12, 1976 and would be used by the Department of Revenue to require the collection of motor vehicle, mobile home, travel trailer and

camper taxes from all Indians residing on any reservations in the State of Washington prerequisite to issuing by the state of licenses, registration, or titles of motor vehicles, mobile homes, travel trailers and campers, whether at the time of the original purchase or later. On November 15, 1976 the plaintiff Tribes were advised by Mr. William Smith, Supervisor of the Use Tax Division, Washington Department of Revenue, that the motor vehicle, mobile home, travel trailer and camper tax rests on the provision provided in Rule 192 that licensing of motor vehicles, mobile homes, travel trailers or campers raises a presumption that they are for use on the highways of the State of Washington.

2.23 **State Licensing Requirements.** The Supreme Court of the State of Washington held in *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969) that state jurisdiction and regulatory power extends not only to Washington state highways but to Bureau of Indian Affairs roads inside Indian reservations. Therefore, motor vehicles of the three plaintiff Tribes and their enrolled tribal members may not be used on roads inside the Colville, Lummi and Makah Indian Reservations without being licensed pursuant to state law, and such motor vehicles may not be licensed under Rule 192 without the payment of state tax.

2.24 **Construction and Maintenance of Bureau of Indian Affairs Roads.** The State of Washington neither pays for the construction nor the maintenance of Bureau of Indian Affairs roads. All such roads are constructed and maintained either by the Bureau of Indian Affairs or one of the three plaintiff Tribes within its respective Reservation.

2.25 **Motor Vehicles on the Colville Indian Reservation.** The Colville Indian Reservation comprises 1.3 million acres or approximately 2,000 square miles, and has in excess of 5,000 miles of roads of all types, including state public highways. Total population of the Colville

Indian Reservation, including enrolled tribal members and non-members is 7,027. Approximately 3,200 enrolled tribal members reside on the Reservation. The average Indian household comprises five persons. Since the Reservation is remote, physically isolated and largely undeveloped, most essential goods and services needed by tribal members are located off the reservation and can only be reached by private automobile. Almost every Indian household on the Colville Indian Reservation owns one automobile and a high percentage own a second automobile. The Colville Confederated Tribes itself owns and operates 99 motor vehicles, trailers and trucks which are used in the furtherance of tribal business. Some tribal and individually owned vehicles are used exclusively within the Colville Reservation; some are used partly outside the Colville Reservation.

2.26 **Motor Vehicles on the Lummi Indian Reservation.** The Lummi Indian Reservation comprises 7,319 acres and has 40 miles of roads of all types, including county roads. Approximately 1,250 enrolled tribal members reside on the Lummi Indian Reservation; the average Indian household comprises five persons. Since the greater portion of the Lummi Indian Reservation is located upon a peninsula west of Bellingham, Washington, is isolated and undeveloped, most essential goods and services needed by tribal members are available only off the reservation and require the use of automobiles or other vehicles. Most Lummi Indian households own at least one automobile and many own a second automobile. Some tribal and individually owned vehicles are used within the Lummi Reservation; some are used partly outside the Reservation.

The Lummi Indian Tribe itself owns and operates 31 automobiles, trucks and other vehicles which are used in furtherance of tribal business.

2.27 **Lummi Vehicle License Ordinance.** Plaintiff Lummi Indian Tribe has amended the Lummi Law and Order Code by enacting a vehicle license ordinance on

January 28, 1974 which provides for the exclusive registering and licensing by the Lummi Indian Tribe of all motor vehicles owned, rented or leased by the Lummi Indian Tribe and used exclusively in its service. The Lummi vehicle licensing ordinance provides for payment to the Tribe of an annual license fee of $25.00 per vehicle.

2.28 **Motor Vehicles on the Makah Indian Reservation.** The Makah Indian Reservation comprises approximately 28,000 acres and has 64 miles of roads of various types but has no state highways or county roads.

Total population of the Makah Indian Reservation, including enrolled tribal members and non-members is 1,435; approximately 900 enrolled tribal members reside on the Makah Indian Reservation. The average Indian household comprises five persons. Since the Makah Indian Reservation is located at Neah Bay, Washington, the extreme northwest tip of the Olympic Peninsula, is extremely isolated and relatively undeveloped, most essential goods and services needed by tribal members are located off the reservation and can only be reached by private automobile. At present little or no public transportation is available. A recent public transportation survey indicates that 77% of the 257 Indian households on the Reservation owns one automobile and a high percentage owns a second automobile.

The Makah Indian Tribe itself owns and operates 32 automobiles, trucks and other vehicles which are used in furtherance of tribal business. Some tribal and individually owned vehicles are used exclusively within the reservation; others are used partly outside the Colville Reservation. [*sic*]

2.29 **Mobile Homes on the Colville Indian Reservation.** Indian families live in approximately 100 mobile homes on the Colville Indian Reservation. In addition, approximately 7 Colville families per month purchase mobile homes. The average price per mobile home is $18,000; thus the average state sales tax on the purchase of a mobile home would be $954 for a total of

$6,617 per month for new mobile homes on the Colville Indian Reservation.

2.30 **Mobile Homes on the Lummi Indian Reservation.** Indian familes live in approximately 40 mobile homes on the Lummi Indian Reservation. In addition, approximately 20 Lummi Indian families are in the process of purchasing, or planning to purchase mobile homes. The average price per mobile home is $18,000; thus the average state sales tax on the purchase of a mobile home would be $954 for a total of $19,080 tax on mobile homes that Lummi Indian families presently plan to purchase.

2.31 **Mobile Homes on the Makah Indian Reservation.** Indian families live in approximately 36 mobile homes on the Makah Indian Reservation. In addition, approximately 24 Makah Indian families are in the process of purchasing, or planning to purchase mobile homes. The average price per mobile home is $18,000; thus the average state sales tax on the purchase of a mobile home would be $954 for a total of $22,896 tax on mobile homes that Makah Indian families presently plan to purchase.

2.32 **The Need for Registering and Titling Mobile Homes.** Mobile homes purchased by enrolled tribal members of the three plaintiff Tribes are financed through tribal credit programs, Bureau of Indian Affairs loan programs, or private financial institutions. All three require that the mobile homes be registered and titled under Washington state law and that the lender be shown as a lienholder on the title as a prerequisite to their lending funds for the purchase of the mobile home. Accordingly, Indian families on the three Reservations are unable under Rule 192 to purchase mobile homes without the payment of Washington state mobile home taxes.

2.33 **State.** The State is a sovereign state of the United States. Its tax laws pertaining to cigarettes, tobacco products, and sales of tangible personal property

and services are administered by an agency of the State, the Department of Revenue.

2.34 **Purchase of Cigarettes by Non-members of Tribes.** A majority of the cigarettes and tobacco products sold by licensed tribal tobacco outlets on the three plaintiff Reservations are purchased by non-members of the respective Tribes. No precise figures are available to measure the exact percentage of cigarettes and tobacco products purchased by the members of the Tribe.

2.35 **State Cigarette Tax.** The State cigarette excise tax amounts to $1.60 per carton on cigarettes.

2.36 **Rule 192.** On November 12, 1976, effective December 12, 1976, the State amended its regulations pertaining to state cigarette and sales taxes on sales by licensed Indian retailers of the Tribes to non-members of the Tribes, by adopting WAC 458-12-192 (Rule 192).

2.37 **ETB 504.** On November 24, 1976, the State issued its Excise Tax Bulletin No. 504.08.192, outlining procedures to implement Rule 192 and to provide additional explanation of certain provisions of that administrative rule.

Pursuant to ETB 504 licensed retailers of the Tribes are required to register with the State (without payment of registration fee) and to keep certain records documenting the tax exempt status of sales to members of the three plaintiff Tribes. The following records are required to be kept by all retailers, including licensed retailers of the Tribes.

(a) Name of the Indian purchaser;
(b) The tribal affiliation of the purchaser;
(c) The Indian reservation to which or within which delivery was made, or within which retail services were rendered;
(d) The dollar amount of the sale; and
(e) The date of the sale.

2.38 **State Stamp Requirement.** Tribally-licensed tobacco outlet operators of the Tribes may possess unstamped cigarettes for purposes of resale to members of the three plaintiff Tribes. However, state law provides that at the time of sale of cigarettes and tobacco products to a non-member of the Tribes, the operators must affix state cigarette tax stamps and collect and remit to the State the cigarette and tobacco products excise taxes imposed on the purchaser. The operators may fulfill this stamping responsibility either by: (1) purchasing pre-stamped cigarettes and tobacco products from a wholesaler licensed by the State to affix Washington tax stamps; or (2) purchasing a supply of stamps from the State, in which case the purchase price may be deferred for a period of 30 days upon the posting of a bond in the amount of the purchase price of $2,500, whichever is greater. [*sic*] In the event the operator affixes stamps himself, he will be entitled to compensation at the rate of $1.85 per thousand packs of cigarettes.

2.39 **Refusal of Tribes.** The plaintiff Tribes and their tribally-licensed tobacco outlet operators have never sought the authorization of the State to acquire and possess unstamped cigarettes and tobacco products and they have never requested to be licensed by the State for purposes of sales of cigarettes and tobacco products. The operators of the Tribes have failed and will continue to fail and refuse to affix stamps, or otherwise collect and remit any state cigarette and tobacco products excise taxes imposed on non-members of the Tribes purchasing at retail from such operators.

3. PLAINTIFFS' CONTENTIONS.

3.1 A three judge court was properly convened because plaintiffs' complaint seeks to enjoin the enforcement of the state statutes on the ground that they violate the Commerce Clause, Art. I, Sec. 8, the Commerce with the Indian Tribes Clause, Art. I, Sec. 8, the Due Process Clause of the 14th Amendment, and the Equal Protection

Clause of the 14th Amendment of the Constitution of the United States.

3.2 Ch. 240, Laws of 1957, and Ch. 36, Laws of 1963, codified as RCW Ch. 37.12, are invalid in that they violate Public Law 83-280 (67 Stat. 588) and 25 Stat. 676, the enabling act admitting the State of Washington into the Union and are unconstitutional since they violate Article XXVI, Second Section of the Washington State Constitution and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that the Washington State Constitution has never been amended and jurisdiction over Indians and Indian tribes has never validly been assumed by the State of Washington.

3.3 Ch. 36, Laws of 1963, codified as RCW Ch. 37.12 is invalid in that it violates Public Law 83-280 (67 Stat. 588) and 25 Stat. 676, the enabling act admitting the State of Washington into the union and is unconstitutional since it violates Article XXVI, Second Section of the Washington State Constitution and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that it provides for only partial assumption of jurisdiction over Indians and Indian tribes.

3.4 The State of Washington has no authority to enforce state criminal or civil laws against members of the plaintiff Tribes.

3.5 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute unconstitutional burdens on Indian commerce in violation of Article I, Sec. 8, Cl. 3 of the United States Constitution.

3.6 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute unconstitutional burdens on Indian commerce in violation of the preemptive right of Congress to regulate this commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.

3.7 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute an undue burden on Indian commerce in subjecting it to double taxation in violation of Article I, Sec. 8, Cl. 3 and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

3.8 The actions of defendants in enforcing cigarette tax provisions of Ch. 82.24 RCW, as applied to plaintiffs, constitute violations of the Treaty of Point Elliott, the Treaty with the Makah and the Colville Executive Order of July 2, 1872.

3.9 The actions of defendants in enforcing Ch. 82.24 RCW as applied to plaintiffs constitute unconstitutional burdens on Indian commerce in violation of federal statutes and regulations, including but not limited to 25 U.S.C. §261 *et seq.* and 25 C.F.R. §251 *et seq.* concerning the licensing and regulating of federal Indian traders.

3.10 The actions of defendants in enforcing RCW Ch. 82.24 as applied to plaintiffs constitute unconstitutional interference with the sovereignty of Indian tribes which have preempted the field of cigarette taxation through federally approved tribal ordinances.

3.11 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute violations of the provisions and policies of the General Allotment Act, 24 Stat. 388 (1887).

3.12 The actions of defendants in enforcing RCW Ch. 82.24 as applied to plaintiffs constitute violations of Public Law 83-280 (67 Stat. 588) by creating encumbrances and taxes on trust and federally restricted Indian property.

3.13 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute violations of established federal trust policy of insuring maximum profitability of the use of Indian trust land.

3.14 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to

plaintiffs by stopping and seizing cigarettes destined for Indian tribes, which cigarettes are in licensed, sealed trucks in interstate commerce, constitute unconstitutional burdens on interstate commerce and infringe on the power of Congress to regulate such commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.

3.15 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs by seizing plaintiffs' property and interfering with plaintiffs' rights to sell their products freely within the boundaries of their reservation constitute deprivation of plaintiffs' property without due process of law and constitute denial to plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

3.16 An injunction should issue restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette taxes on sales of cigarettes on plaintiffs' Indian reservations, seizing cigarettes on such reservations or en route to such reservations through the State of Washington, attempting to influence cigarette wholesalers not to sell to plaintiffs and in any way attempting to tax or interfere with the cigarette merchandising activities on plaintiffs' reservations.

3.17 Damages in the amount of $56,118.00 should be awarded to the Colville Confederated Tribes as compensation for cigarettes seized and from related costs and lost tax revenues suffered by plaintiff Colville Confederated Tribes.

3.18 Damages in the amount of $43,662.50 should be awarded as compensation for cigarettes seized and related costs including lost tax revenues suffered by plaintiff Lummi Indian Tribe.

3.19 Damages in the amount of $5,094.00 should be awarded as compensation in lost tax revenues suffered by plaintiff Makah Indian Tribe.

3.20 Plaintiffs should be awarded their costs and reasonable attorneys' fees in this action.

3.21 Since the plaintiff Tribes are immune from suit in federal court without their consent, the court has no jurisdiction to entertain the claims for relief proposed by defendants in their counterclaims or in this pre-trial order.

3.22 The revenues derived by the plaintiff Tribes from their respective cigarette taxing ordinances are an important source of tribal revenue for the conduct of essential tribal governmental programs.

3.23 Under RCW 82.24, the Washington Cigarette and Tobacco Products Tax is levied upon the first taxable event occurring within the State. Taxable events include the handling, distribution and possession of cigarettes, and, under the statute, the interstate transportation of cigarettes by an interstate carrier destined for one of the plaintiff tribes is a taxable event. As a result, the legal incidence of the tax will fall upon the plaintiff tribe or tribal outlet in actual possession of the cigarettes or upon the plaintiff tribe for whom the cigarettes are bound in the stream of interstate commerce.

3.24 The volume of cigarettes sold by the tribal outlets to Indians is less than 10% of the total volume of cigarettes sold. If the state Cigarette and Tobacco Products Tax is enforced against the plaintiff tribes and the tribal outlets, the result will be that the price of cigarettes sold to non-Indians on the reservation by the tribal outlets will be greater than the price of cigarettes sold off the reservation. The practical economic results that will occur if the state Cigarette and Tobacco Products Tax is enforced against the tribes will be: 1) The tribal tobacco enterprises will be operating at a competitive disadvantage to off-reservation sellers and will not be able to survive economically. 2) The plaintiff tribes will no longer be able to generate any tax revenues under their respective cigarette ordinances. 3) Commerce on the Indian reservation between Indian sellers and non-Indian

buyers will be drastically diminished or eliminated on the respective reservations of the plaintiff tribes.

3.25 **Tribal Tax Losses.** As a result of the seizures and threats by the State of Washington, plaintiffs' cigarette sales have been curtailed, and plaintiffs have suffered general losses of tax revenues from June 1972 through December 1973 as follows:

Colville Tribes	$54,630.00
Lummi Tribe	$32,022.00
Makah Tribe	$ 5,094.00

4. ADDITIONAL FACTS.

The parties hereto, by and through their counsel, stipulate and agree that the facts set forth herein are true and correct, and that several documents attached as exhibits hereto are true, accurate, and conformed copies of the originals thereof, and may be received herein without further authentication. Plaintiffs object to admission into evidence of all of the facts set forth herein on the grounds of immateriality and irrelevancy to the issues involved in this action.

4.1 The Colville Reservation has state highways within its exterior boundaries and the Lummi Reservation has county roads within its exterior boundaries. These state highways and county roads are repaired and maintained with state funds.

5. DEFENDANTS' CONTENTIONS.

5.1 The State of Washington may require tribally-licensed Indian retailers to collect and remit state excise taxes imposed on non-members of the tribe making purchases of goods and services at retail within the exterior boundaries of plaintiffs' Indian Reservations.

5.2 Washington state sales tax (RCW Ch. 82.08), cigarette tax (RCW Ch. 82.24) and tobacco products tax (RCW Ch. 82.26) are imposed upon non-members of plaintiffs' tribes making purchases of goods and services at

retail within the exterior boundaries of plaintiffs' reservation.

5.3 Washington may adopt and enforce reasonable rules and regulations to enforce state excise tax collection responsibility on retail sales of cigarettes, tobacco products, and goods and services by tribally-licensed retailers of plaintiffs' tribes to non-members of the tribes. The rules and regulations contained in WAC 458-12-192 and E.T.B. 504.08.192 are reasonable and may be enforced against tribally-licensed retailers of plaintiffs' tribes.

5.4 A tribal tax imposed on tribally-licensed Indian retailers of plaintiffs' tribes with respect to sales of cigarettes to non-members of the tribe does not pre-empt a state excise tax imposed upon non-members of the tribe with respect to the same transaction.

5.5 Washington may classify as "contraband" unstamped cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiffs' Indian reservations or are in transit in interstate commerce to plaintiffs' Indian reservations from points outside the state.

5.6 Plaintiff tribes' damages resulting from the seizure and sale of unstamped cigarettes by the state should be limited to the wholesale value of cigarettes, plus applicable tribal tax, reasonably intended for resale to members of plaintiffs' tribes for ultimate consumption. In the absence of records detailing actual sales to members of plaintiffs' tribes, the amount of such cigarettes reasonably intended for resale for ultimate consumption should be determined by reference to tribal membership and average United States per capita consumption of cigarettes in the year in which the cigarettes were seized.

5.7 A reasonable estimate of the amount of state tax loss on sales of cigarettes by plaintiff tribal licensees during the period 1972 through 1976 is as follows:

Colville Reservation	— $2,165,214.00
Lummi Indian Reservation	— $2,482,226.00
Makah Indian Reservation	— $ 5,769.00

5.8 The state may impose its motor vehicle excise tax (Ch. 82.44), travel trailer and camper excise tax upon vehicles owned by the Tribes or individual members and used on the highways of the State of Washington.

5.9 The court does not have jurisdiction to entertain plaintiffs' claims for relief insofar as such claims pertain to individual members of the tribes, because such persons have an adequate remedy at state law.

6. ISSUES OF FACT.

6.1 What would be the economic effect on the plaintiff Tribes, their tribal tobacco enterprises, and the tribally-licensed operators of tribal cigarette outlets of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

6.2 What would be the economic effect on the tribal taxing schemes and tribal self-government of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

6.3 What would be the economic effect on commerce between Indians and non-Indians on the Reservation of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

6.4 What damages have the plaintiff Tribes suffered as a result of the seizures and threatened seizures by the State of Washington from June 1972 through December 1973?

7. ISSUES OF FACT-LAW.

Plaintiffs contend that the following questions are questions of mixed fact and law; defendants contend that the following questions are questions of law only.

7.1 **State Tax Burden on Tribes and Operators.** Would the cigarette excise and tobacco products taxes sought to be imposed by the defendants pursuant to RCW Ch. 82.24 to sales of cigarettes and tobacco products by plaintiff Tribes pursuant to their tribal tobacco ordinances impose a direct tax burden upon plaintiff Tribes, their tribal tobacco enterprises or the tribally-licensed operators of tribal cigarette outlets?

7.2 Would the cigarette excise and tobacco products taxes sought to be imposed by defendants pursuant to RCW Ch. 82.24 interfere with the tribal taxing ordinances and interfere with tribal self-government?

7.3 Would the cigarette excise and tobacco products taxes sought to be imposed by the defendants pursuant to RCW Ch. 82.24 interfere with or destroy the tribal tobacco enterprises, interfere with or destroy the existing commerce between Indian retailers and non-Indian buyers on the reservation, and interfere with the economy of the tribes and the reservations?

8. ISSUES OF LAW.

8.1 Does the three judge federal district court have jurisdiction pursuant to 28 U.S.C. §2281 on the ground that the complaint seeks to enjoin the enforcement of state statutes on the ground that they are in violation of the Constitution of the United States?

8.2 Has the State of Washington validly assumed jurisdiction over Indian reservations and their enrolled tribal members as provided in Public Law 83-280?

8.3 May the State of Washington apply its cigarette excise and tobacco products tax provisions to cigarette and tobacco products being sold on trust land within the three Reservations of the plaintiff Tribes pursuant to their federally-approved tobacco ordinances?

8.4 May the State of Washington lawfully assess its cigarette excise and tobacco products taxes upon cigarettes and tobacco products being shipped from outside the State of Washington to the Reservations of the three plaintiff Tribes, which cigarette and tobacco products are consigned to the tribal goverments?

8.5 May the State of Washington lawfully seize as contraband cigarette and tobacco products which are being shipped from outside the State of Washington to the Reservations of the three plaintiff Tribes, consigned to the tribal government and intended for resale in tribally licensed tobacco outlets on trust land inside the three Reservations?

8.6 Can the State of Washington lawfully seize and levy upon property of plaintiff Indian Tribes to collect for taxes assessed against plaintiff Indian tribes?

8.7 Do the actions, policies and statutes of the State of Washington regarding cigarette excise taxes, RCW Ch. 82.24 as applied to plaintiffs, violate the United States Constitution, Article I, Sec. 8, Cl. 3, the Fourteenth Amendment to the United States Constitution, the laws of the United States, and in particular Title 25 of the U.S. Code, the Treaty of Point Elliott, the Treaty with the Makah, the Colville Executive Order of July 2, 1872, the sovereignty of plaintiff Tribes, the General Allotment Act of 1887, Public Law 83-280 and federal trust policy?

8.8 Is the State of Washington liable for damages suffered by plaintiff Tribes as a result of the seizure of cigarettes and interference with tribal cigarette sales programs?

8.9 Does RCW Ch. 82.24 cause the legal incidence of the cigarette excise and tobacco products taxes to fall upon the plaintiff Tribes, the tribal outlet operators, or upon the ultimate non-Indian consumer?

8.10 In view of the immunity from suit of the three plaintiff Tribes, may the State of Washington attempt to seek relief against the plaintiff Tribes without their consent?

8.11 May the State of Washington impose its motor vehicles excise tax, RCW Ch. 82.44 and its travel trailer and camper excise tax, RCW Ch. 82.50, upon motor vehicles, travel trailers and campers owned by plaintiff Tribes and their enrolled tribal members resident upon their respective reservations?

8.12 May the State of Washington impose its sales and use taxes, RCW Ch. 82.08 and RCW Ch. 82.12, upon mobile homes located on the reservation and owned by plaintiff Tribes and their enrolled tribal members resident upon their respective reservations?

8.13 Does 28 U.S.C. §1341 bar this court from granting declaratory or injunctive relief with respect to tax claims of individual Indians?

9. ADDITIONAL ISSUE OF LAW.

The complaint raises the question whether the State's assumption of jurisdiction in RCW Ch. 37.12 over Indian reservations in Washington is valid. Although plaintiffs seek an injunction against the State's exercise of jurisdiction over the Reservations, it appears that no three judge panel is required. See *Moe v. Confederated Salish and Kootenai Tribes,* ____ U.S. ____, 48 L.Ed.2d 96, 111 n. 17 (1976). Thus, the following issue concerning the district court's jurisdiction has arisen:

May the District Court judge member of the three-judge court, hear and consider on the merits an issue of law raised in the complaint which does not require determination by a three judge court under 28 U.S.C. §2281?

10. EXHIBITS.

The following exhibits were produced and may be received in evidence if otherwise admissible, without further authentication, it being admitted that each is what it purports to be:

Plaintiffs' Exhibits:

10.1 Constitution and By-Laws of the Confederated Tribes of the Colville Reservation, approved February 26, 1938.

10.2 Constitution and By-Laws of the Lummi Indian Tribe, approved April 10, 1970.

10.3 Constitution and By-Laws of the Makah Indian Tribe, approved May 16, 1936.

10.4 Letter of October 26, 1972 from Area Director of Bureau of Indian Affairs to Superintendent of Colville Indian Agency, approving Colville Tobacco Ordinance, with copy of Ordinance attached.

10.5 Letter of November 8, 1972 from Area Director of Bureau of Indian Affairs to Superintendent of Western Washington Indian Agency, approving Lummi Tobacco Ordinance, with copy of Ordinance attached.

10.6 Letter of April 7, 1972 from Superintendent of Western Washington Indian Agency to Chairman of Makah Indian Tribe, approving Makah Tobacco Ordinance, with copy of Ordinance attached. (On January 18, 1973, the Makah Tobacco Ordinance was amended to restrict tobacco outlets to trust land, to ensure that all purchases made by the Tribe are made with federally-restricted tribal funds and to prohibit sales of tobacco products to persons under the age of 18 years.)

10.7 Federal Trader's Licenses issued to Collins and Wilmes Cigar Company for sales to tribes on reservations.

10.8 Colville Tobacco Ordinance, as amended, Resolution 1974-565, dated August 23, 1974.

10.9 Makah Tobacco Ordinance, as amended, Resolution 13-75, August 22, 1974.

10.10 Lummi Tobacco Ordinance, as amended, Resolution S-3, Ordinance L-40, August 30, 1974.

10.11 Lummi Code of Laws, Ch. 6.11 Vehicle Licenses (Lummi Vehicle Licensing Ordinance).

Defendants Exhibits:

(1) WAC 458-12-192
(2) ETB 504.08.192

11. ACTIONS OF THE COURT.

11.1 On November 5, 1973, this Court issued a Temporary Restraining Order enjoining the State of Washington and its agents and employees from enforcing its statutes and regulations concerning cigarettes destined for plaintiff Tribes, transported by licensed carriers in interstate commerce, and their possession, distribution and ultimate retail sale through tribal tobacco outlets on trust lands inside their respective reservations pursuant to their respective tribal cigarette ordinances.

11.2 On September 6, 1974, this Court issued a Preliminary Injunction enjoining the State of Washington and its agents and employees from enforcing its statutes and regulations concerning cigarettes destined for plaintiff Tribes, transported by licensed carriers in interstate commerce, and their possession, distribution and ultimate retail sale through tribal tobacco outlets on trust lands inside their respective reservations pursuant to their respective tribal cigarette ordinances.

It is hereby ordered that the foregoing constitutes the Pre-Trial Order in the above-entitled cause and that upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended, except by consent of the parties, or by order of the court to prevent manifest injustice.

DATED this 28th day of March, 1977.

/s/_____
John F. Kilkenny
UNITED STATES CIRCUIT COURT

* * * *

EXHIBIT 10.1 [to Pre-Trial Order]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

*

CONSTITUTION AND BY-LAWS
OF THE
CONFEDERATED TRIBES
OF THE COLVILLE RESERVATION

*

APPROVED FEBRUARY 26, 1938

* * *

CONSTITUTION AND BY-LAWS
OF THE
CONFEDERATED TRIBES
OF THE COLVILLE RESERVATION DIGEST

P R E A M B L E

ARTICLE I PURPOSE

ARTICLE II GOVERNING BODY

Sections

1. Name
2. Councilmen Number
3. Representation from Districts
4. Power to Change Districts and Representation
5. Officers
6. Candidate Qualifications
7. Council Sole Judge of its Members

ARTICLE III NOMINATIONS AND ELECTIONS

Sections

1. First Election and Terms of Office
2. Rules for Election

3. Candidate Procedures
4. Certification of Election
5. Qualifications for Voters

ARTICLE IV VACANCIES AND REMOVAL FROM OFFICE

Sections

1. Regulations to fill vacated position (amended)
2. To Expel Councilman
3. Petition to Recall

ARTICLE V POWERS AND DUTIES OF THE COUNCIL

1. Powers and Duties
   Uses of tribal property, protection, preservation of wildlife and natural resources, promulgate and enforce ordinances, etc.

ARTICLE VI AMENDMENTS TO CONSTITUTION

CONSTITUTIONAL AMENDMENTS

Amendments:

No.

1. Time and Place of Meetings, Procedures
2. Vacancies and Removals from Office
3. Membership

Sections

1. Provisions governing membership
   (a) All persons whose names appear on January 1, 1937 Census Roll.
   (b) All children born after January 1, 1937.
   (c) All children born after January 1, 1937, whose parents reside off reservation.
2. Power to prescribe rules and regulations
   (a) Approval by Secretary of the Interior
   (b) One-fourth degree Indian blood adoption requirement
   (c) Loss of membership, Alien Indians

4. Vacancies and Removal from Office
5. After July, 1959, ¼ degree Colville Indian blood requirement.

BY-LAWS OF THE CONFEDERATED TRIBES

ARTICLE I THE BUSINESS COUNCIL

Sections

1. Chairman, authority, tie vote, etc.
2. Vice Chairman, duties
3. Secretary, duties
4. Appointive Officers

ARTICLE II TIME AND PLACE OF MEETINGS AND PROCEDURE

Sections

1. Regular meeting schedule, special meetings
2. Quorum
3. Order of Business
4. Reports of meeting by Councilman

ARTICLE III RATIFICATION OF CONSTITUTION AND BY-LAWS

CONSTITUTION AND BY-LAWS OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

P R E A M B L E

We, the people of the Colville Reservation in the State of Washington, in order to form a recognized representative council to handle our Reservation affairs, and in order to improve the economic condition of ourselves and our posterity, do hereby establish this Constitution and By-Laws.

ARTICLE I — PURPOSE

The object and purpose shall be to promote and protect the interests of the Colville Indians and to

preserve peaceful and cooperative relations with the Office of Indian Affairs, its officers and appointees.

ARTICLE II — GOVERNING BODY

Section 1. The governing body of the Confederated Tribes of the Colville Reservation shall be a council known as the Colville Business Council.

Section 2. The Business Council shall consist of fourteen (14) Councilmen to be elected from the districts as set forth hereafter.

Section 3. The representation from the districts hereby designated shall be as follows: Inchelium district, four councilmen; Nespelem district, four councilmen; Omak district, four councilmen; Keller district, two councilmen.

Section 4. The Business Council shall have the power to change the districts and the representation from each district based upon community organization or otherwise, as deemed advisable, such change to be made by ordinance, but the total number of councilmen shall not be changed, as provided for in Section 2 of Article II of this Constitution.

Section 5. The Business Council so organized shall elect from within its own number (1) a chairman; (2) a vice-chairman; and from within or without its own membership (3) a secretary; and may appoint such other officers and committees as may be deemed necessary.

Section 6. No person shall be a candidate for membership in the Business Council unless he shall be a member of the Confederated Tribes of the Colville Reservation and shall have resided in the district of his candidacy for a period of one year next preceding the election, and be at least twenty-five (25) years of age.

Section 7. The Business Council of the Confederated Tribes of the Colville Reservation shall be the sole judge of the qualifications of its members.

ARTICLE III — NOMINATIONS AND ELECTIONS

Section 1. The first election of the Business Council

under this Constitution shall be called, held and supervised by the Superintendent of the Reservation and the delegates who were selected by the Districts and who prepared this constitution, within sixty days after its ratification and approval.

At the first election, the two candidates receiving the highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve two years; the candidate receiving the highest number of votes in the Keller district shall serve two years. The two candidates receiving the next highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve one year; and the candidate receiving the next highest number of votes in the Keller district shall serve one year. Thereafter, elections for the Business Council shall be held every year and shall be called at least sixty days before expiration of the terms of office.

The terms of office of a councilman shall be for a period of two years, unless otherwise provided herein.

Section 2. The Business Council, or an election board appointed by the Council, shall determine rules and regulations governing all elections.

Section 3. Any qualified member of the Confederated Tribes may announce his candidacy for the Business Council within the district of his residence, in accordance with Section 6 of Article II.

Section 4. The Business Council, or a board appointed by the Business Council, assisted by the Superintendent of the Reservation, shall certify to the election of the Business Council members within five days after election returns.

Section 5. Any enrolled member of the Confederated Tribes of the Colville Reservation who is twenty-one (21) years of age or over shall be entitled to vote.

ARTICLE IV — VACANCIES AND REMOVAL FROM OFFICE

Section 1. If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the Reservation, or shall be found guilty of a felony or

misdemeanor involving dishonesty in any Indian, State, or Federal Court, the Business Council shall declare the position vacant and the district affected shall elect to fill the unexpired term. *(This Section amended. See Amendment II)*

Section 2. The Business Council may by majority vote expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken in the matter, such member or official shall be given a written statement of the charges against him at least five days before the meeting of the Business Council before which he is to appear, and he shall be given an opportunity to answer any and all charges at the designated Council meeting. The decisions of the Business Council shall be final.

Section 3. Upon receipt of a petition signed by one-third (1/3) of the eligible voters in any district calling for the recall of any member of the Council representing said district, it shall be the duty of the Council to call an election on such recall petition.

No members may be recalled in any such election unless at least 40% of the legal voters of the district shall vote in such election. *(This Section amended. See Amendment IV).*

ARTICLE V — POWERS AND DUTIES OF THE COUNCIL

Section 1. The Business Council shall have the following powers, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached By-Laws;

(a) To confer with the Commissioner of Indian Affairs or his representatives and recommend regarding the uses and disposition of tribal property; to protect and preserve the Tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian Arts, crafts, and culture; to administer charity, to protect the health, security, and general welfare of the Confederated Tribes.

(b) To exclude from the restricted lands of the Reservation persons not legally entitled to reside thereon,

under ordinances which may also be subject to review by the Secretary of the Interior.

(c) To recommend and help to regulate the inheritance of real and personal property, other than allotted lands, within the Colville Reservation.

(d) To regulate the domestic relations of members of the Confederated Tribes.

(e) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon non-members doing business within the Reservation, or obtaining special rights or privileges, and the same may be applied to members of the Tribes provided such ordinances have been approved by a referendum of the Confederated Tribes.

Article VI — Amendments

This Constitution and By-Laws may be amended by a majority of the qualified voters of the Confederated Tribes voting at an election called for that purpose. Provided, that the Tribal Council shall have adopted the amendment by a two-thirds (2/3) vote, but no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs.

CONSTITUTIONAL AMENDMENTS

Amendment I

Article II, Section 1, By-law: Time and Place of Meetings and Procedure. — Regular meetings of the Business Council shall be held on the second Thursday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. *(Adopted by Confederated Tribes, June 15, 1946. Approved by Acting Commissioner of Indian Affairs May 8, 1947.)*

Amendment II

Article IV, Section 1. Vacancies and Removal From Office. — If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the reservation, or shall be found guilty of a felony or misdemeanor involving dishonesty in any Indian, State of Federal court, the Business Council shall declare the position vacant and appoint a member from the district affected to fill the unexpired term. *(Adopted by Confederated Tribes June 15, 1946. Approved by Acting Commissioner of Indian Affairs May 8, 1947.)*

Amendment III

Article VII, Membership of the Confederated Tribes of the Colville Reservation. — There shall be added a new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:

Section 1.—The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:

(a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining a permanent residence on the Colville Indian Reservation.

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining residence elsewhere in the continental United States, provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs. To indicate such willingness to maintain tribal affiliation, the parent or guardian shall, within six months after the birth of the child submit a written application to have the child enrolled. The application

shall be accompanied by the child's birth certificate together with any other evidence as to the eligibility of the child for enrollment in the Confederated Tribes of the Colville Reservation. If the certificate and application are not filed within the designated time, the child will not be enrolled.

Section 2. The Business Council of the Confederated Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood.

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Alien Indians may be deleted from the rolls after they have been given an opportunity to be heard in their own behalf. The tribe shall also take appropriate action to correct the existing tribal roll and, if necessary, delete from the rolls alien Indians whose names appear on the rolls of the Confederated Tribes and who have abandoned tribal relations. The Colville Confederated Tribes shall not deprive anyone of vested property rights, such as allotments or inherited interests. *(Adopted by Confederated Tribes May 20, 1949. Approved by Commissioner of Indian Affairs April 14, 1950.)*

Amendment IV

That Section 3, of Article IV, Vacancies and Removal from Office, is hereby amended to read:

Section 3. By the eligible voters of any district filing with the Colville Business Council a typewritten or printed petition, signed by at least one-third (1/3) the number of those who were eligible to vote in the last preceding election, charging that a council member

representing such district has violated his oath of office or committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, a demand may be made for a recall of such council member provided the act or acts complained of are set forth in concise language and the signature of each petitioner has alongside it those of two witnesses thereto and the petitioner's post office address.

The Council shall, at its next meeting after the filing of such petition, determine whether the petition as filed meets the requirements of this section of the Constitution and if it finds that such requirements have been complied with, shall call a special election on such recall petition, said election to be held not sooner than 30 days after the action of the Council on the petition nor more than 60 days after the date of such Council action.

The ballot to be voted on at such special election shall contain the charging part of the petition hereinabove referred to.

No member may be recalled at any such election unless at least forty percent (40%) of the eligible voters of the district shall have voted at such election and unless a majority of those voting vote in favor of recall. *(Adopted by Confederated Tribes May 9, 1959. Approved by Acting Commissioner of Indian Affairs July 2, 1959.)*

Amendment V

There shall be added to Amendment III, Membership of the Confederated Tribes of the Colville Reservation, a new provision governing membership of the said tribes which shall read as follows:

Section 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (1/4) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation. *(Adopted by the Colville Confederated Tribes on May 9, 1959. Approved by the Acting Commissioner of Indian Affairs July 2, 1959.)*

BY-LAWS OF THE CONFEDERATED TRIBES

ARTICLE I — THE BUSINESS COUNCIL

Section 1. *Chairman of the Business Council.* The Chairman of the Business Council shall preside over all meetings of the Business Council. He shall perform all duties of the Chairman and exercise authority delegated to him by the Business Council. He shall vote only in the case of a tie.

Section 2. *Vice-Chairman of the Business Council.* The Vice-Chairman of the Business Council shall assist the Chairman when called upon to do so. In the absence of the Chairman, he shall preside. When so presiding, he shall have all the rights, privileges and duties, as well as the responsibilities of the Chairman.

Section 3. *Secretary of the Business Council.* The Secretary of the Business Council shall conduct all correspondence and keep a complete and accurate record of all matters transacted at Council Meetings. It shall be his duty to submit promptly to the Superintendent of the jurisdiction copies of all minutes of regular and special meetings of the Business Council and the Tribes.

Section 4. *Appointive Officers.* The duties of all appointive committees and officers appointed by the Colville Business Council shall be clearly defined by resolution of the Business Council at the time of their creation or appointment. Such committees and officers shall report from time to time as required, to the Business Council, and their activities and decisions shall be subject to review by the Business Council upon petition of any person aggrieved.

ARTICLE II — TIME AND PLACE OF MEETINGS AND PROCEDURE

Section 1. Regular meetings of the Business Council shall be held on the second Friday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. *(This section amended. See Amendment I.)*

Special meetings may be called by written notice signed by the Chairman or by a majority of the Business Council members, and when so called the Business Council shall have power to transact business as in regular meetings.

Section 2. — *Quorum.* No business shall be transacted unless a quorum is present. A quorum shall consist of eight (8) councilmen.

Section 3. — *Order of Business.* The following order of business is established for all meetings:

1. Call to order by the Chairman.
2. Roll call.
3. Ascertainment of a Quorum.
4. Reading of the minutes of the last meeting.
5. Adoption of the minutes by a vote or common consent.
6. Unfinished business.
7. New Business.
8. Adjournment.

Section 4. — *Report of Meetings.* It shall be the duty of each member of the Business Council to make reports concerning the proceedings of the Business Council to the members of the district from which he is elected.

ARTICLE III — RATIFICATION OF CONSTITUTION AND BY-LAWS

This Constitution and By-Laws shall be in full force and effect whenever a majority of the adult voters of the Confederated Tribes voting at an election called by the Commissioner of Indian Affairs, in which at least thirty percent (30%) of the eligible voters vote, shall have ratified such Constitution and By-Laws and the Commissioner of Indian Affairs shall have approved same.

CERTIFICATION OF ADOPTION

Pursuant to the request of a majority of the Indians of the Colville Reservation to obtain for themselves a representative organization, this Constitution and By-Laws was duly submitted by the Commissioner of Indian

Affairs to the adult Indians living on the Reservation for ratification and was on February 26, 1938, duly ratified by a vote of 503 for, and 76 against, in an election in which over 30 percent of those entitled to vote cast their ballots.

/Signed/ Harvey K. Meyer	/Signed/Gus Whitelaw
Superintendent, Colville Agency	Chairman, Constitutional Committee

APPROVAL

This Constitution and Bylaws, having been proposed and duly ratified by the Indians of the Colville Reservation on February 26, 1938, at a referendum called by me, is herewith approved.

/signed/ John Collier

Commissioner of Indian Affairs

Washington, D.C.
April 19, 1938

This is a true and correct copy of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation. Issued: August 1, 1967

/signed/ Harry Owhi

Executive Secretary

EXHIBIT 10.2 [to Pre-Trial Order]

CONSTITUTION AND BYLAWS OF THE LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON

Preamble

We, the members of the Lummi Tribe of Indians of the Lummi Reservation in the State of Washington, in order to make the tribal government, established by the constitution and bylaws approved April 2, 1948, more responsive to the tribe, to develop our community resources, administer justice, protect our tribal interests, and promote the economic and social welfare of ourselves and our descendants, and to preserve our land base, culture, and identity, do hereby establish this constitution and bylaws, which shall revoke and replace said constitution and bylaws approved April 2, 1948, and shall henceforth constitute the governing document of the Lummi Tribe.

Article I—Territory

The jurisdiction of the Lummi Tribe shall extend to the territorial boundaries of the Lummi Reservation as established by the Treaty of January 22, 1855, and by Executive Order of November 11, 1873, and to such other lands as may be hereafter added thereto. However, nothing in this article shall be construed as restricting the treaty hunting and fishing rights of members, including the right to hunt and fish in usual and accustomed places.

Article II—Membership

Section 1. The membership of the Lummi Tribe shall consist of the following:

(a) All persons of Indian blood whose names appear

on the Official Census Roll of the Tribe as of January 1, 1942, provided that such roll may be corrected by the Lummi Business Council with the approval of the Commissioner of Indian Affairs.

(b) Any persons of Indian blood who were residents of the reservation on January 1, 1947, and whose names would have been placed on a census roll of that date had one been prepared.

(c) All other persons of Indian blood resident on the reservation at any time between January 1, 1942, and the effective date of this constitution, who were accepted by the general council as members of the Lummi Tribe.

(d) All children born between January 1, 1942, and the effective date of this constitution, to any member of the tribe who was living on the Lummi Reservation at the time of the birth of said child.

(e) All children of one-fourth (¼) degree or more Indian blood born between January 1, 1942, and the effective date of this constitution, to any member of the tribe not living on the reservation at the time of the birth of said child.

(f) All children of one-fourth (¼) degree or more Indian blood born to any member of the tribe after the effective date of this constitution.

SEC. 2. The Lummi Business Council shall have the power to pass ordinances subject to the approval of the Commissioner of Indian Affairs, governing future membership, abandonment of membership, and the adoption of new members, provided that all adoptions must be approved by the general council.

ARTICLE III—GENERAL COUNCIL

SECTION 1. *The general council* shall consist of the entire voting membership of the Lummi Tribe when it is convened officially for official business. The annual general council meeting shall be called during the first week of January, provided that special meetings shall be

called by majority vote of the business council or upon the request, in writing, of twenty voting members of the tribe. Public notices of all special general council meetings shall be made at least ten (10) days prior to such meetings. It shall also be the duty of the chairman to make a report at the annual general council meeting of the activities of the business council throughout the past year and to outline proposed plans for future economic and social betterment of the tribe.

SEC. 2. *Voter Qualifications.* Any member of the Lummi Tribe, twenty-one (21) years of age, or over, who has maintained legal residence on the reservation or within the boundaries of Whatcom County, Washington, for at least six (6) months immediately preceding any election, shall be qualified to vote on all matters before the general council meetings.

SEC. 3. *The duties of the general council* shall consist of, but need not be limited to the following:

(a) Act on all adoptions recommended by the business council, as provided in Section 2, Article II of this constitution;

(b) Review the actions of the business council at the annual meeting;

(c) Recommend actions to be taken by the business council;

(d) Appoint a committee to certify all elections to the business council;

(e) Consider the recall of members of the business council, as provided in Section 2, Article V, and consider all referendums, as provided in Article VII of this constitution.

ARTICLE IV—GOVERNING BODY

SECTION 1. *The governing body* of the Lummi Tribe shall be a business council consisting of eleven (11) members duly elected to serve for a three-year term, as provided in Section 4 of this Article, provided that a

minimum of seven (7) members must live on the reservation.

SEC. 2. *Qualifications.* Any eligible voter shall be qualified to serve as a member of the Lummi Business Council, provided that he has been living within the boundaries of Whatcom County, Washington for at least one (1) year immediately preceding any election, and complies with Section 1 of this Article.

SEC. 3. *Selection of Officers.* The business council so organized shall, on a yearly basis, elect from within its own number: (1) a chairman, (2) a vice-chairman, (3) a secretary, and (4) a treasurer, and may appoint or employ such other officers or committees as may be necessary.

SEC. 4. *Election of Business Council Members.* After the ratification and approval of this constitution and bylaws, the first business council under this constitution shall be the council existing under the 1948 constitution. Members of that body shall draw lots in order that the terms of office of the present members can be determined for one, two, or three years, and thereafter an election shall be held at the next regular general council meeting for the positions held by the three councilmen who drew the one-year lots, with an election of these three positions every three years thereafter. In the other years, four councilmen shall be elected at the regular general council meeting, first for the positions held by the four councilmen who drew the two-year lots and then for he positions held by the four councilmen who drew the three-year lots.

ARTICLE V—VACANCIES AND RECALL

SECTION 1. *Vacancy.* If any member of the business council shall die, resign, or move outside the boundaries of Whatcom County, or shall be found guilty of a felony, or a misdemeanor involving dishonesty in any Indian, State, or Federal court, a vacancy in his office shall automatically be created, and at its next regular or special meeting, the

business council shall appoint a person qualified pursuant to Article IV to fill the office until the next annual general council meeting, at which time a successor shall be elected pursuant to Article IV, to fill the office for the balance of the unexpired term, provided that whether vacancies are filled by appointment or election, the number of council members required to live on the reservation pursuant to Section 1, Article IV, shall be maintained.

If a business council member changes his residence from the reservation to elsewhere within Whatcom County during his term of office, and if such move results in less than the number of business council members required to live on the reservation by Section 1, Article IV, that council member's position shall automatically become vacant and shall be filled pursuant to this section.

SEC. 2. *Recall.* The members of the general council shall have the power to initiate recall of any member of the business council by filing a petition with the secretary of the business council, signed by at least twenty-five percent (25%) of the number of those voting at the last regular general council meeting, asking for the recall of said member of the business council; or, the business council may, by majority vote, initiate recall of any councilman for neglect of duty or gross misconduct, provided that in neither procedure shall a person be recalled except at a special meeting of the general council called for that purpose within thirty days after the business council action or the filing of the voter petition, provided that he shall be given in writing a statement of the charges against him at least ten (10) days prior to the general council meeting, provided further, that he shall be given an opportunity to answer any and all charges. A two-thirds (⅔) majority vote of those attending the meeting shall be required to effect recall. The general council's decision shall be final.

SEC. 3. *Unexcused Absence.* Any councilman who shall absent himself from three (3) successive meetings

without being excused for cause, shall forfeit all rights to his office.

Article VI—Powers and Duties of the Business Council

Section 1. The Lummi Business Council shall have the following powers, subject to any limitation imposed by Federal statutes or by the Constitution of the United States:

(a) To administer all tribal property and assets, by ordinance where required;

(b) To borrow money from the Federal Government, or other sources, and to direct the use of such funds for productive purposes, or loan money to members of the Lummi Tribe, as defined in Article II;

(c) To collect and expend any Lummi tribal funds within the exclusive control of the tribe, and to recommend the expenditure of any other tribal funds;

(d) To purchase or lease in the name of the Lummi Indian Tribe any land or other property the council may deem beneficial to said Lummi Tribe;

(e) To enforce regulations contained in approved tribal resolutions and ordinances for the protection of tribal property, fish and wild life, and other natural resources of the Lummi Tribe;

(f) (1) To levy assessments or license fees on nonmembers doing business or obtaining special privileges within the reservation, subject to the approval of the Commissioner of Indian Affairs.

(2) To promulgate rules and regulations and enforce assessments or license fees on members exercising special privileges or profiting on general resources from tribal property;

(g) To negotiate with the Federal, State, and local governments on behalf of the tribe;

(h) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Commissioner of Indian Affairs;

(i) To prevent the sale of tribal lands or interests in tribal lands without the consent of the general council;

(j) To exclude from the restricted land of the Lummi Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to the approval of the Commissioner of Indian Affairs;

(k) To promulgate and enforce ordinances, which shall be subject to the approval of the Commissioner of Indian Affairs, governing the conduct of members of the Lummi Tribe, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers;

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Lummi Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that ordinances directly affecting nonmembers of the tribe shall be subject to approval of the Commissioner of Indian Affairs;

(m) To adopt resolutions regulating the procedure of the business council itself and subordinate tribal organizations, and tribal officials over whom it has jurisdiction;

(n) To promote public health and education, encourage Indian handicrafts, the administration of charity, the conservation and utilization of natural resources, and such other services which may contribute to the social advancement of the tribe;

(o) To make rules and procedures not inconsistent with the provisions of this constitution governing all tribal elections, which shall, among other things, provide for secret balloting;

(p) To delegate to subordinate boards or to cooperative associations which are open to all members of the tribe, any of the foregoing powers, reserving

the right to review any action taken by virtue of such delegated powers, provided that all final action must be taken by the business council.

SEC. 2. *Future Powers.* The Lummi Business Council may exercise such further powers as may, in the future, be delegated to the business council.

SEC. 3. *Reserved Powers.* Any rights and powers heretofore vested in the tribe but not expressly referred to in this constitution shall not be abridged by this article, but may be exercised by the people of the Lummi Reservation through the adoption of appropriate bylaws and constitutional amendments.

ARTICLE VII—REFERENDUM

Upon receipt of a petition of at least twenty-five percent (25%) of the voting membership of the tribe, or upon the request of the majority of the full membership of the business council, the chairman shall call a special meeting of the general council to be held within thirty (30) days of receipt of such petition or request, to consider any enacted or proposed ordinances or resolutions, and the vote of the majority of the voting membership attending the special meeting will decide whether the enacted or proposed ordinances or resolutions shall thereafter be in effect, provided that twenty-five percent (25%) or more of the eligible voters shall vote in such referendum. Public notices of all special meetings shall be made in accordance with Section 1, Article III.

ARTICLE VIII—BILL OF RIGHTS

All members of the Lummi Indian Tribe shall be accorded equal rights pursuant to tribal law. No member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution of the United States, including, but not limited to, freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or

the redress of grievances, and due process of law. No member shall be denied any of the rights or guarantees as provided in Title II of Public Law 90-284 — the Act of April 11, 1968 (82 Stat. 77 and 78) as follows:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or *ex post facto* law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

ARTICLE IX—AMENDMENTS

This constitution and bylaws may be amended by a two-thirds (⅔) vote of those voting at an election authorized for that purpose by the Commissioner of Indian Affairs, provided that at least thirty percent (30%) of those entitled to vote shall vote in such an election. No amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs.

It shall be the duty of the Commissioner of Indian Affairs to authorize an election upon presentation of a request by a two-thirds (⅔) vote of the members of the business council present at a duly convened meeting or upon receipt of a petition signed by thirty (30) eligible voters of the tribe.

BYLAWS OF THE LUMMI TRIBE

ARTICLE I—THE BUSINESS COUNCIL

SECTION 1. *The chairman* of the business council shall preside over all business and general council meetings of the tribe. He shall be allowed to vote only in case of a tie. He shall exercise any authority specifically delegated to him by the business council.

SEC. 2. *The vice-chairman* of the business council shall assist the chairman when called upon to do so. In the absence of the chairman, he shall preside, and when so presiding, have all the rights, privileges, and duties, as well as the responsibilities, of the chairman.

SEC. 3. *The secretary* shall prepare all tribal correspondence and shall not sign notices or documents

unless authorized by the business council. It shall be the duty of the secretary to keep a complete and accurate record of all matters transacted at council meetings and to submit copies of minutes of all meetings of the business council and general council to the Western Washington Agency.

SEC. 4. *The treasurer* shall have custody of and be responsible for all funds in the custody of the business council. The treasurer shall deposit all such funds in such federally insured banks or elsewhere as directed by the business council and shall keep proper records of such funds. The treasurer shall report on all receipts and expenditures and the amount and nature of all funds on hand at the annual general council meeting and upon request of the business council. The treasurer shall not pay out any funds except when authorized to do so by the business council and all checks must be signed by the treasurer. The business council shall decide when the amount of funds being handled by the treasurer has become large enough to justify the need for an annual audit. It shall then require that the books and records of the treasurer shall be audited by either a competent auditor or by a Federal employee appointed by the Commissioner of Indian Affairs or his authorized representative. The treasurer will be required to have a surety bond satisfactory to the business council and the Superintendent of the Western Washington Agency. The surety bond will be obtained at the expense of the tribe.

SEC. 5. *Appointive Officers.* The duties of all appointive committees and officers appointed by the business council shall be clearly defined by resolution of the business council at the time of their creation or appointment. Such committees or officers shall report from time to time, as required, to the business council and their activities and decisions shall be subject to review by the business council upon petition of any person aggrieved.

Article II—Installation of Officers and Council Members

Newly elected members who have been duly certified shall be installed thereafter at the next regular meeting of the business council. Each member of the business council and each officer or subordinate officer, elected or appointed hereunder, shall take an oath of office prior to assuming the duties thereof, by which oath he shall pledge himself to support and defend the Constitution of the United States and this constitution and bylaws.

Oath: "I, _____, do solemly swear that I will support and defend the Constitution of the United States and the constitution of the Lummi Tribe; that I will carry out, faithfully and impartially, the duties of my office to the best of my ability; that I will cooperate, promote, and protect the best interests of my tribe, in accordance with its constitution and bylaws."

Article III—Time and Place of Meetings and Procedure

Section 1. *Regular meetings* of the business council shall be held on the first Friday of each month. The date of regular meetings may be changed by resolution of the business council. Meetings shall be held at the business office or such other places as the business council may designate from time to time. Special meetings may be called by written notice to all councilmen, signed by the chairman, or by a majority of the business council, and when so called by written notice to all councilmen, the business council shall have power to transact business as in a regular meeting.

Sec. 2. *The annual election and general council meeting* shall be held during the first week in January of each year, or at such other time as the business council determines.

Sec. 3. *Quorum.* No business shall be transacted

unless a quorum is present. A quorum of the business council shall consist of six (6) members of that council. A quorum of the general council shall consist of twenty-five (25) eligible voters; provided, however, that the lack of a quorum shall not be cause for postponing the annual election of tribal officials.

Sec. 4. *The order of business* for all meetings is that established in *Robert's Rules of Order,* Revised Edition.

Article IV—Ratification of Constitution and Bylaws

This constitution and bylaws, when adopted by a majority vote of the adult voters of the Lummi Tribe, voting at a special election authorized by the Commissioner of Indian Affairs in which at least thirty percent (30%) of those entitled to vote shall vote, shall be submitted to the Commissioner of Indian Affairs for his approval. It shall be in force from the date of such approval.

Approval

I, James F. Canan, Acting Commissioner of Indian Affairs do hereby approve the foregoing Constitution and Bylaws of the Lummi Tribe of the Lummi Reservation, Washington, as provided for in Article IV of the bylaws — Ratification of Constitution and Bylaws of said document.

/s/_____
James F. Canan
Acting Commissioner of
Indian Affairs

Washington, D.C.
Date: April 10, 1970

EXHIBIT 10.3 [to Pre-Trial Order]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

*

CONSTITUTION AND BYLAWS OF THE
MAKAH INDIAN TRIBE OF THE
MAKAH INDIAN RESERVATION
WASHINGTON

*

APPROVED MAY 16, 1936

* * * *

CONSTITUTION AND BYLAWS OF THE MAKAH INDIAN TRIBE OF THE MAKAH INDIAN RESERVATION

PREAMBLE

We, the members of the Makah Indian Tribe, in order to establish a more perfect tribal organization, promote the general welfare, conserve and develop our land, timber, and other resources, and secure to ourselves and our posterity the power to exercise certain rights of home rule, not inconsistent with the Federal, State, and local laws, do ordain and establish this constitution for the Makah Indian Tribe of the Makah Indian Reservation, of the State of Washington.

ARTICLE I.—TERRITORY

The jurisdiction of the Makah Indian Tribe shall extend to the territory within the confines of the Makah Indian Reservation boundaries as established in the treaty of January 31, 1855, and by Executive orders made pursuant thereto, and to such other lands as may be hereafter added thereto.

ARTICLE II.—MEMBERSHIP

SECTION 1. The membership of the Makah Indian Tribe shall consist as follows:

(a) All persons of Indian blood whose names appear on the official census roll of the tribe as of April 1, 1935.

(b) All children born to any member of the Makah Indian Tribe who is a resident of the reservation at the time of the birth of said child.

(c) Persons of Makah Indian blood who may hereafter be adopted as tribal members by order of the tribe.

SEC. 2. The tribal council shall have the power to promulgate ordinances, subject to review by the Secretary of the Interior, governing, future membership and the adoption of new members. Property rights shall not be changed by any action under this section.

ARTICLE III.—GOVERNING BODY

SECTION 1. The governing body of the Makah Indian Tribe shall consist of a council known as the Makah Indian tribal council.

SEC. 2. This council shall consist of five members, duly elected to serve 3 years, except as provided in section 4, two members being elected each year except that every third year, one shall be elected.

SEC. 3. The council so organized shall elect from within its own number (1) a chairman; (2) a vice chairman; and from within or without (3) a secretary, and (4) a treasurer; and may appoint or employ such other officers or committees as may be deemed necessary.

SEC. 4. The present tribal council within 60 days after the ratification and approval of this constitution, shall call a general tribal meeting for the election of officers in accordance with this constitution. The two candidates receiving the highest number of votes shall hold office until December 1938. The two candidates receiving the next highest number of votes shall hold office until December 1937, and the next highest until December 1936. Thereafter, the term of office for councilmen elected under this constitution shall be 3 years. After the first

election, elections for the tribal council shall be held on the last Monday in December.

ARTICLE IV.—ELECTIONS FOR THE TRIBAL COUNCIL

SECTION 1. Any member of the tribe 21 years of age or over who has maintained a legal residence on the reservation for 1 year immediately preceding any election shall be entitled to vote or be elected to office therein.

SEC. 2. Any legal voter shall be eligible to serve as a member of the council.

SEC. 3. All elections shall be by secret ballot and shall be held in accordance with rules and regulations prescribed by the tribal council, or by an election board appointed by the tribal council.

ARTICLE V.—VACANCIES AND REMOVAL FROM OFFICE

SEC. 1. If a council member shall die, resign, or permanently leave the reservation, or be removed from office for cause, the council shall declare the position vacant and appoint a successor to serve until the annual general tribal meeting in December, at which time the general tribal meeting shall elect a successor for the unexpired term.

SEC. 2. The tribal council may, by a four-fifths vote of its total membership, expel any member for neglect of duty or gross misconduct, provided such charges are in writing, subscribed by competent witnesses and formally served upon the accused at least 5 days prior to the hearing. The accused member shall be given a full and fair opportunity to reply to any and all such charges against himself, and also the opportunity to summon witnesses in his behalf.

SEC. 3. Upon a petition of at least one-third of the eligible voters of the Makah Indian Tribe it shall be the duty of the tribal council to call a special election to consider the recall of the member or members of the council named in such petition. In the event that a majority of those voting in such election favor such recall from office, the office shall be declared vacant and the

tribal council shall proceed in the usual manner to hold an election to fill the said vacancy.

ARTICLE VI.—POWERS OF THE TRIBAL COUNCIL

SECTION 1. The tribal council shall exercise the following powers, subject to any limitations imposed by the Federal statutes, the Constitution of the United States, and subject further to all express restrictions upon such powers provided in this constitution and bylaws.

(a) To negotiate with the Federal, State, and local Governments on behalf of the tribe, and to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the tribe and its members.

(b) To employ legal counsel for the protection and advancement of the rights of the tribe and its members, the choice of such counsel and the fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To approve or veto any sale, disposition, lease, or incumbrance of tribal lands, interests in lands, or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other official or agency of Government, provided that no tribal lands shall ever be sold or encumbered except for governmental purposes, or leased for a period exceeding 5 years, except that leases for mining purposes may be made for such longer periods as may be authorized by law.

(d) To advise with the Secretary of the Interior or his representatives on all appropriation estimates, or Federal projects for the benefit of the tribe prior to their submission to the Bureau of the Budget and to Congress.

(e) To manage all economic affairs and enterprises of the tribe, in accordance with the terms of a charter that may be issued to the tribe by the Secretary of the Interior.

(f) To levy and collect taxes upon members of the tribe, or to require the performance of community labor in lieu thereof, provided that no taxes may be levied, nor community labor required, except when approved at the

annual December general tribal meeting, or at a special general tribal meeting called for that purpose.

(g) To levy and collect taxes or license fees upon nonmembers doing business on the reservation, to exclude from the territory of the tribe persons not legally entitled to reside thereon, or trespassers upon the reservation, under ordinances, all of which shall be subject to review by the Secretary of the Interior.

(h) To enact resolutions or ordinances not inconsistent with article II of this constitution, governing adoption and abandonment of membership, and to keep at all times a correct roll of the members of the Makah Indian Tribe.

(i) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Makah Indian Tribe, and providing for the maintenance of law and order, and the administration of justice by establishing a reservation Indian court, and defining its duties, powers, and limitations.

(j) To safeguard and promote the peace, safety, morals, and general welfare of the Makah Indian Tribe by regulating the conduct of trade and the use and disposition of property upon the reservation: *Provided*, That any ordinances directly affecting nonmembers of the tribe shall be subject to review by the Secretary of the Interior.

(k) To charter subordinate organizations for economic purposes, and to regulate the activities of cooperative associations of members of the Makah Indian Tribe by ordinance: *Provided*, That any such ordinance shall be subject to review by the Secretary of the Interior.

(l) To appropriate for public purposes of the tribe any available tribal funds, provided that any such appropriation made prior to July 1, 1940, shall be subject to review by the Secretary of the Interior.

(m) To provide for the appointment of guardians for minors and mental incompetents by ordinance or

resolution subject to review by the Secretary of the Interior.

(n) To adopt resolutions regulating the procedure of the council itself and other tribal agencies and tribal officials of the reservation.

(o) To delegate to subordinate boards, or to cooperative associations which are open to all members of the tribe, any of the foregoing powers, reserving the right to review any action taken by such body to whom such power has been delegated.

SEC. 2. *Manner of review.*—Any resolution or ordinance which by the terms of this constitution is subject to review by the Secretary of the Interior, shall be presented to the superintendent of the reservation who shall, within 10 days thereafter, approve or disapprove the same. If the superintendent shall approve said ordinance or resolution it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within 90 days from the date of enactment rescind the said ordinance or resolution for any cause by notifying the tribal council of such decision.

If the superintendent shall refuse to approve any resolution or ordinance submitted to him within 10 days after its enactment, he shall advise the Makah tribal council of his reasons therefor. If these reasons appear to the council insufficient, it may by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within 90 days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

SEC. 3. *Further powers.*—The Makah Indian tribal council may exercise such further powers as may in the future be delegated to it by the Secretary of the Interior, or by any other duly authorized official or agency of government.

SEC. 4. *Reserved powers.*—Any rights or powers heretofore vested in the Makah Indian Tribe but not

expressly referred to in this constitution shall not be abridged by this article, but may be exercised by the people of the Makah Indian Tribe through the adoption of appropriate bylaws and constitutional amendments.

ARTICLE VII—BILL OF RIGHTS

SECTION 1. *Suffrage.*—All members of the tribe over the age of 21 shall have the right to vote in all tribal elections. The residence qualifications established by article IV of this constitution shall apply to all elections except elections for the amendment of this constitution and bylaws.

SEC. 2. *Economic right.*—All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the reservation.

SEC. *Civil liberties.*—All members of the tribe may enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly, and association.

SEC. 4. *Rights of accused.*—Any member of the Makah Indian Tribe accused of any offense shall have the right to a prompt, open, and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses on his own behalf. Trial by jury may be demanded by any prisoner accused of any offense punishable by more than 30 days' imprisonment or by more than $45 fine.

Excessive bail shall not be required and cruel punishment shall not be imposed.

ARTICLE VIII.—LAND

SECTION 1. *Allotted lands.*—Allotted lands, including heirship lands, within the Makah Reservation shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be condemned for public purposes, such as roads, public buildings, or other public improvements, upon payment of adequate compensation, by any agency of the State of Washington or of the Federal Government, or by the tribe itself. It is further recognized that under existing law such

lands may be inherited by the heirs of the present owner, whether or not they are members of the Makah Indian Tribe. Likewise it is recognized that under existing law the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may then be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in the constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the Makah Indian Tribe either in exchange for a money payment or in exchange for an assignment covering the same land, or other land, as hereinafter provided.

SEC. 2. *Tribal lands.*—The unallotted lands of the Makah Reservation, and all lands which may hereafter be acquired by the Makah Indian Tribe or by the United States in trust for the Makah Indian Tribe shall be held as tribal lands, and no part of such land shall be mortgaged or sold. Tribal lands shall not be allotted to individual Indians but may be assigned to members of the Makah Indian Tribe, or leased, or otherwise used by the tribe, as hereinafter provided.

SEC. 3. *Leasing of tribal lands.*—Tribal lands may be leased by the tribal council, with the approval of the Secretary of the Interior, for such periods of time as are permitted by law.

In the leasing of tribal lands preference shall be given, first, to Indian cooperative associations of members of the tribe; and secondly, to individual Indians who are members of the Makah Indian Tribe.

SEC. 4. *Grant of standard assignments.*—In any assignment of tribal lands which now are owned by the tribe or which hereafter may be acquired for the tribe by the United States or purchased by the tribe out of tribal funds, preference shall be given, first, to heads of families which are entirely landless; and secondly, to heads of

families which shall have no allotted lands or interests in allotted lands, but shall have already received assignments consisting of less than an economic unit of agricultural land or other land or interest in land of equal value.

No allotted member of the Makah Indian Tribe who may hereafter have the restrictions upon his land removed and whose land may thereafter be alienated except to the tribe shall be entitled to receive an assignment of land as a landless Indian.

The tribal council may, if it sees fit, charge a fee of not to exceed $5 on approval of an assignment made under this section.

Assignments made under this section shall be for the primary purpose of establishing homes for landless Indians, and shall be known as standard assignments.

SEC. 5. *Tenure of standard assignments.*—If any member of the tribe holding a standard assignment of land shall, for a period of 2 years fail to use the land so assigned or use such land for any unlawful purpose, his assignment may be canceled by the tribal council after due notice and an opportunity to be heard, and the said land may be reassigned in accordance with the provisions of section 4 of this article.

Upon the death of any Indian holding a standard assignment, his heirs or other individuals designated by him, by will or by written request, shall have a preference in the reassignment of the land, provided such persons are members of the Makah Indian Tribe who would be eligible to receive a standard assignment.

SEC. 6. *Grant of exchange assignments.*—Any member of the tribe who owns an allotment or any share of heirship land may voluntarily transfer his interests in such land to the tribe in exchange for an assignment to the same land or other land of equal value. If the assignee prefers, he may receive, in lieu of a specific tract of land, a proportionate share in a larger grazing unit.

Assignments made under this section shall be known as "exchange assignments."

SEC. 7. *Leasing of exchange assignments.*—Exchange assignments may be used by the assignee or leased by him to Indian cooperative associations of members of the tribe to individual members of the tribe, or, if no individual Indian or Indian cooperative association of members is able and willing to rent the land at a reasonable fee, such assignments may be leased to non-members in the same manner as allotted lands.

SEC. 8. *Inheritance of exchange assignments.*—Upon the death of the holder of any exchange assignment, such land shall be reassigned by the tribal council to his heirs or devisees, subject to the following conditions:

(a) Such lands may not be reassigned to any heir or devisee who is not a member of the Makah Indian Tribe, except that a life assignment may be made to the surviving widower or widow of the holder of an assignment.

(b) Such lands may not be reassigned to any heir or devisee who already holds more than an economic unit of land to be determined from time to time by the tribal council.

(c) Such lands may not be subdivided among heirs or devisees into units too small for convenient management. No area of uncleared or timber land shall be subdivided into units smaller than 40 acres, and no area of tillable agricultural land shall be subdivided into units smaller than 2½ acres, except that land used for buildings or other improvements may be divided to suit the convenience of the parties. Where it is impossible to divide the land properly among the eligible heirs or devisees, the tribal council may issue to the eligible heirs or devisees interests in tribal lands of the same value as the assignment of the decedent.

(d) If there are no eligible heirs or devisees of the decedent, the land shall be eligible for reassignment in accordance with the provisions of section 4 of this article.

SEC. 9. *Inheritance of improvements.*—Improvements of any character made upon assigned land may be bequeathed to and inherited by members of the

Makah Indian Tribe or otherwise disposed of under such regulations as the tribal council shall provide: *Provided further,* That sales of improvements on the land of any decedent can be made only to members of the Makah Indian Tribe.

SEC. 10. *Exchange of assignments.*—Assignments may be exchanged between members of the Makah Indian Tribe by common consent in such manner as the tribal council shall designate.

SEC. 11. *Use of unassigned tribal land.*—Tribal land which is not assigned, including tribal timber reserves, shall be managed by the tribal council for the benefit of the members of the entire tribe, and any cash income derived from such land accrue to the benefit of the tribe as a whole. All action of the tribal council with respect to such lands shall be in conformity with departmental regulations for the protection of Indian range and timber resources authorized by section 6 of the act of June 18, 1934.

SEC. 12. *Purchase of land by tribe.*—Tribal funds may be used, with the consent of the Secretary of the Interior, to acquire land, under the following conditions:

(a) Land within the Makah Reservation or adjacent to the boundaries thereof which is not now in Indian ownership may be purchased by or for the Makah Indian Tribe.

(b) Restricted land, which is in heirship status at the time of the adoption and approval of this constitution, may be purchased by or for the tribe, with the consent of all the adult heirs, and the legal guardians of minor heirs, payment therefor to be made as may be agreed upon.

(c) Land owned by any member of the tribe who is over the age of 60 years, or who is physically incapacitated, may be transferred by its owner to the tribe in exchange for a pension of not more than twice the annual rental value of the land for the life of the pensioner, to be paid out of available tribal funds.

(d) Land owned by any member of the tribe in excess

of his needs for domestic purposes may be purchased by the tribe with the consent of the owner, payments to be made on such terms as may be agreed upon by the council and the owner.

(e) Land owned by any members of the tribe who desire to leave the reservation permanently may be purchased by the tribe under such terms as may be agreed upon.

SEC. 13. *Method of making assignments.*—Applications for assignment shall be filed with the secretary of the council and shall be in writing, setting forth the name of the person or persons applying for the land and as accurate a description of the land desired as the circumstances will permit.

Notice of all applications received by the secretary shall be posted by him in the agency office and in at least three other conspicuous places on the reservation for not less than 20 days before action is taken by the council. Any member of the tribe wishing to oppose the granting of an assignment shall do so in writing, setting forth his objections, to be filed with the secretary of the council, and may if he so desires, appear before the council to present evidence. The secretary of the council shall furnish the superintendent or other officers in charge of the agency a complete record of all action taken by the council on applications for assignment of land, and a complete record of assignments shall be kept in the agency office and shall be open for inspection by members of the tribe.

The council shall draw up one or more forms for standard and exchange assignments, which shall be subject to the approval of the Secretary of the Interior.

ARTICLE IX.—REFERENDUM

Upon a petition of [*sic*] least one-third of the qualified voters of the Makah Indian Tribe, a referendum may be demanded on any enacted or proposed ordinance or resolution of the tribal council, and the vote of the

majority of the qualified voters in such referendum shall be conclusive and binding on the tribal council.

ARTICLE X.—AMENDMENTS

This constitution and bylaws may be amended by a majority vote of the qualified voters of the tribe voting at an election called for that purpose by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.

It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment upon receipt of a petition signed by one-third of the qualified voters, members of the tribe.

BYLAWS OF THE MAKAH INDIAN TRIBE

ARTICLE I.—DUTIES OF OFFICERS

SECTION 1. *Chairman of the council.*—The chairman of the council shall preside over all meetings of the council; shall perform all duties of the chairman, and exercise any authority delegated to him by the council. The chairman shall also preside at all regular and special meetings of a general tribal nature. He shall vote only in case of a tie.

SEC. 2. *Vice chairman of the council.*—The vice chairman shall assist the chairman when called upon so to do. In the absence of the chairman he shall preside; when so presiding he shall have all the rights, privileges, duties, and responsibilities, of the chairman.

SEC. 3. *Secretary of the council.*—The secretary of the tribal council shall conduct all tribal correspondence and shall keep an accurate record of all business transacted at council meetings. It shall be his duty to keep minutes of regular and special tribal meetings and to submit copies of such minutes to the superintendent of the jurisdiction and also to the Commissioner of Indian Affairs.

SEC. 4. *Treasurer of the council.*—The treasurer of the tribal council shall account for, receive, receipt for, preserve, and safeguard all funds in the custody of the council, whether same be tribal or other funds for which the council is acting as trustee or custodian. Deposits of such funds shall be made in a bank or elsewhere, as designated by the council, and he shall make and preserve a financial record of all such funds and shall report on all receipts and expenditures, and the amount and nature of all funds in his possession or custody, such report being made in writing to the council at regular meetings, and at such other times as requested by the council. He shall not pay out or otherwise disburse any funds in his possession or custody, or in the possession or custody of the tribal council, until properly authorized so to do by resolution duly passed by the council.

The books and records of the treasurer shall be audited at least once each year by a competent auditor employed by the council and at such other times as the council or the Commissioner of Indian Affairs may direct.

The treasurer shall be required to furnish a bond satisfactory to the council and to the Commissioner of Indian Affairs, and the council is hereby authorized to pay the premium on such bond from any available funds. The treasurer shall be present at all special or regular meetings of the council.

SEC. 5. *Duties of appointive officers and boards.*—The duties of all appointive boards or officers of the council shall be clearly defined by resolution of the council at the time of their creation or appointment. Such boards and officers shall report from time to time, as required, to the council, and their activities and decisions shall be subject to review by the council upon the complaint of any person aggrieved.

ARTICLE II.—CERTIFICATION OF ELECTION

It shall be the duty of the tribal council, or a board appointed by them, to certify to the election of the newly elected tribal council members within 5 days after the

election and thereupon they shall be notified by the secretary of their election.

ARTICLE III.—INSTALLATION OF COUNCIL MEMBERS

Newly elected members who have been duly certified shall be installed thereafter at the next regular meeting of the tribal council. Each newly elected member shall subscribe to the following oath:

STATE OF WASHINGTON,
County of Clallam, ss:

I, _____, do solemnly swear (or affirm) that I will support and uphold the Constitution of the United States, the constitution and laws of the State of Washington and the constitution, bylaws, and ordinances of the Makah Indian Tribe of the Makah Indian Reservation in the State of Washington.

That I will in all respects faithfully and fully perform the duties of my office of _____ for the Makah Indian Tribe of the Makah Indian Reservation, so help me God.

_____

Subscribed and sworn to before me this _____ day of ____ 19 __.

_____

(The oath may be taken and subscribed to before any officer authorized to administer oaths in the State of Washington.)

ARTICLE IV.—COMPENSATION

The tribal council may prescribe such compensation of officers or members of the council as it deems advisable from such funds as may be available, subject to approval of the general tribal meeting.

ARTICLE V.—TIME AND PLACE OF MEETINGS

SECTION 1. *Meetings.*—Regular meetings of the tribal council shall be held at the agency at Neah Bay on the

first Monday of January, April, July, and October, and at such other times as the tribal council may by resolution provide.

Special meetings may be called by a written notice signed by the majority of the tribal council, and, when so called, the tribal council shall have power to transact business as in regular meetings.

SEC. 2. *Quorum.*—No business shall be transacted unless a quorum is present. A quorum shall consist of four council members.

SEC. 3. *Order of business.*—The following order of business is established for all meetings:

1. Call to order by chairman.
2. Roll call.
3. Reading the minutes of last meeting.
4. Unfinished business.
5. Reports.
6. New business.
7. Adjournment.

ARTICLE VI.—GENERAL TRIBAL MEETINGS

SECTION 1. There shall be an annual general tribal meeting open to all members of the tribe held at the agency on the last Monday in December. At this annual meeting, elections shall be held as designated heretofore in this constitution. The bylaws, orders, and resolutions, which are subject to approval at the general tribal meeting, shall be taken up for consideration at this time.

It shall also be the duty of the chairman to make a report at said meeting of the activities of the council throughout the year and to outline proposed plans for economic and social betterment of the tribe.

SEC. 2. Special general tribal meetings may be called by the chairman of the general council: *Provided,* That due notice is posted throughout the reservation at least 15 days prior to such meeting.

Fifty legal voters of the tribe may at any time, by written petition, call a general tribal meeting, provided

that at least 15 days' notice is posted throughout the reservation.

ARTICLE VII.—ADOPTION OF CONSTITUTION OF BYLAWS

This constitution and bylaws, when ratified by a majority vote of the qualified voters of the Makah Indian Tribe of the Makah Reservation voting at an election called for the purpose by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote in such election, shall be submitted to the Secretary of the Interior, and, if approved, shall be effective from the date of approval.

CERTIFICATION OF ADOPTION

Pursuant to an order, approved March 21, 1936, by the Secretary of the Interior, the attached constitution and bylaws were submitted for adoption to the adult members of the Makah Indian Tribe and were on April 18, 1936, duly adopted by a vote 58 for, and 15 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganiztion Act of June 18, 1934 (48 Stat. 984), as amended by the act of June 15, 1935 (Public, No. 147, 74th Cong.).

PERCY IDES,
Chairman of Election Board.
JERRY MCCARTY,
Chairman, Makak [sic] Indian Tribal Council.
HILDRED MCCARTY,
Secretary, Makah Indian Tribal Council.

N. O. NICHOLSON,
Superintendent.

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached constitution

and bylaws of the Makah Indian Tribe of the Makah Indian Reservation.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said constitution or bylaws are hereby declared inapplicable to the Makah Indian Tribe of the Makah Indian Reservation.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and bylaws.

Approval recommended May 7, 1936.

WILLIAM ZIMMERMAN, JR.,
Assistant Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior.

WASHINGTON, D.C., *May 16, 1936.* [SEAL]

EXHIBIT 10.8 [to Pre-Trial Order]

Resolution No. 1974-565
Date Enacted August 23, 1974

RESOLUTION NO. 1974-

COLVILLE TOBACCO ORDINANCE
AS AMENDED

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Indian Reservation, and

WHEREAS, under the Constitution and By-Laws of the Tribes, the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, by virtue of their status as Indian tribes, the Colville Confederated Tribes are authorized by federal law to possess unstamped cigarettes and other tobacco products on the Colville Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Colville Business Council deems it essential to the health, security and general welfare of the Colville Confederated Tribes to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Colville Indian Reservation, and

WHEREAS, the Colville Business Council has heretofore adopted Resolution 1973-375, but now wishes to clarify some sections of that ordinance and to expand the remedies available for violation of the ordinance, and to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Colville Business Council does hereby promulgate and enact the following amended

tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products
within the Colville Indian
Reservation

Section 1. Title.

This ordinance shall be known as the Colville Tobacco Ordinance.

Section 2. Definitions.

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(a) "Tribes" shall mean the Confederated Tribes of the Colville Indian Reservation.

(b) "Council" shall mean the Colville Business Council.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(d) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(e) "Taxable Event" shall mean the sale, use, consumption, handling, possession or distribution of each tobacco product.

(f) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(g) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribes together with all freight charges and other expenses incurred by the Tribes in their receipt and distribution.

(h) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Colville Indian Reservation.

(i) "Operator" shall mean an enrolled member of the Colville Confederated Tribes licensed by the Tribes to manage a tobacco outlet.

Section 3. Establishment of Tobacco Outlets.

The Council shall establish one or more tobacco outlets within the Colville Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

Section 4. Nature of Outlet.

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribes by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7 hereof.

Section 5. Application for Tobacco Outlet License.

Any enrolled member of the Colville Confederated Tribes may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

Section 6. Tobacco Outlet License.

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a five-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Colville Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

Section 7. Trader's License.

No tobacco outlet license shall be issued to an operator until he has obtained a Federal Indian Trader's License from the Superintendent of the Colville Indian Agency. Revocation of the Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

Section 8. Excise Tax Imposed.

There is being levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of three cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable. The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribes pursuant to Section 10 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

Section 9. Purchase by Tribes.

All tobacco products purchased by the Tribes pursuant hereto shall be purchased with federally-restricted tribal funds.

Section 10. Wholesale Distribution.

Wholesale distribution of tobacco products by the Tribes to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

Section 11. Tobacco Products Federally Restricted Tribal Property.

The entire stock of tobacco products distributed hereunder shall remain federally-restricted tribal property owned and possessed by the Tribes until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 10 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

Section 12. Remuneration to Operator.

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

Section 13. Restricted Sales to Non-Indians.

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

Section 14. Restricted Sales to Minors.

An operator may not sell any tobacco products to any person under the age of 18 years.

Section 15. Other Business by Operator.

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribes. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

Section 16. Tribal Immunity — Liability — Credit.

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribes from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribes or to utilize tribal credit.

Section 17. Operating Without License.

No person shall operate a tobacco outlet on the Colville Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

Section 18. Purchases.

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribes.

Section 19. Liability Insurance.

An operator shall maintain liability insurance upon his premises in the sum of $100,000.

Section 20. Revocation of Tobacco Outlet License.

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the remedies provided in Section 21 below.

Section 21. Violation — Remedies.

Upon application by the Chairman of the Council, the Tribal Judge shall issue an order directing the Tribal Law Enforcement Officer to seize all tobacco products from wherever purchased and by whomever owned from any

tobacco outlet being operated in violation of this ordinance. Within three days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in Tribal Court at which time the operator of such outlet shall be given an opportunity to present evidence in defense of his activities. If the Tribal Court shall determine by a preponderance of the evidence that such tobacco outlet was being operated in violation of this ordinance, the Judge shall impose a fine of not less than $50 nor more than $250 in addition to the forfeiture of tobacco products described above.

Section 22. Recovery of Taxes Owed.

The Tribes shall have a cause of action in Tribal Court to recover any taxes owed and not paid to the Tribes in accordance with this or any previous ordinance.

Section 23. Separability.

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

COLVILLE BUSINESS COUNCIL

/s/_____
Chairman

THE FOREGOING RESOLUTION was adopted at a special meeting held on August 23, 1974, at which time 8 Council members were present, and was passed by a vote of 8 FOR and 0 AGAINST, the Chairman, or the Vice Chairman in the Chairman's absence, being authorized to sign the Resolution.

/s/_____
Secretary

EXHIBIT 10.9 [to Pre-Trial Order]

Resolution No. 13-75
Date Enacted August 22, 1974

RESOLUTION NO. 13-75

MAKAH TOBACCO ORDINANCE AS AMENDED

WHEREAS, the Makah Tribal Council is the governing body of the Makah Tribe, an Indian Chartered Corporation as defined in the Reorganization Act of June 18, 1934, and

WHEREAS, under the Constitution and By-Laws of the Tribe, the Makah Tribal Council is charged with the duty of safeguarding and prompting [*sic*] the peace, safety, morals and general welfare of the Makah Tribe by regulating the conduct of trade and the use and disposition of property upon the Reservation, and

WHEREAS, by virtue of its status as an Indian tribe, the Makah Tribe is authorized by federal law to possess unstamped cigarettes and other tobacco products on the Makah Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Makah Tribal Council deems it essential to the peace, safety, morals, and general welfare of the Makah Tribe to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Makah Indian Reservation, and

WHEREAS, the Makah Tribal Council has heretofore adopted Makah Tobacco Ordinance, Resolution No. 52-73, but now wishes to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Makah Tribal Council does hereby promulgate and enact the following amended

tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products within
The Makah Indian Reservation

Section 1. Title.

This ordinance shall be known as the Makah Tobacco Ordinance.

Section 2. Definitions.

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(a) "Tribe" shall mean the Makah Tribe of the Makah Indian Reservation.

(b) "Council" shall mean the Makah Tribal Council.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(d) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(e) "Taxable Event" shall mean the sale, use, consumption, handling, possession or distribution of each tobacco product.

(f) "Retail Selling Price" shall mean the ordinary,

customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(g) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribe together with all freight charges and other expenses incurred by the Tribe in their receipt and distribution.

(h) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Makah Indian Reservation.

(i) "Operator" shall mean an enrolled member of the Makah Tribe licensed by the Tribe to manage a tobacco outlet.

Section 3. Establishment of Tobacco Outlets.

The Council shall establish one or more tobacco outlets within the Makah Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

Section 4. Nature of Outlet.

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribe by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7.

Section 5. Application for Tobacco Outlet License.

Any enrolled member of the Makah Tribe may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

Section 6. Tobacco Outlet License.

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a five-year

period which shall entitle the operator to establish and maintain one tobacco outlet on the Makah Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

Section 7. Traders License.

Within 30 days after receipt of a tobacco outlet license, an operator must apply to the Superintendent of the Western Washington Indian Agency for a Federal Indian Trader's License. Failure of an operator to apply for or to obtain a Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

Section 8. Excise Tax Imposed.

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of five cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribe pursuant to Section 9 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

Section 9. Wholesale Distribution.

Wholesale distribution of tobacco products by the Tribe to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

Section 10. Tobacco Products Federally Restricted Trial Property.

The entire stock of tobacco products distributed

hereunder shall remain federally-restricted tribal property owned and possessed by the Tribe until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 9 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

Section 11. Remuneration to Operator.

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

Section 12. Restricted Sales to Non-Indians.

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

Section 13. Restricted Sales to Minors.

An operator may not sell any tobacco products to any person under the age of 18 years.

Section 14. Other Business by Operator.

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribe. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

Section 15. Tribal Immunity — Liability — Credit.

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribe from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribe or to utilize tribal credit.

Section 16. Operating Without License.

No person shall operate a tobacco outlet on the Makah Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

Section 17. Purchases.

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribe.

Section 18. Liability Insurance.

An operator shall maintain liability insurance upon his premises in the sum of $100,000.

Section 19. Revocation of Tobacco Outlet License.

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the remedies provided in Section 20 below.

Section 20. Violation — Remedies.

Upon application by the Chairman of the Council, the Tribal Judge shall issue an order directing the Tribal Law Enforcement Officer to seize all tobacco products from wherever purchased and by whomever owned from any tobacco outlet being operated in violation of this ordinance. Within three days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in Tribal Court at which time the operator of such outlet shall be given the opportunity to present evidence in defense of his activities. If the Tribal Court shall determine by a preponderance of this evidence that such tobacco outlet was being operated in violation of this ordinance, the Judge shall impose a fine of not less than $50 nor more than $250 in addition to the forfeiture of tobacco products described above.

Section 21. Recovery of Taxes Owed.

The Tribe shall have a cause of action in Tribal Court

to recover any taxes owed and not paid to the Tribe in accordance with this or any previous ordinance.

Section 22. Separability.

If any provisions of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

MAKAH TRIBAL COUNCIL

/s/_____
Chairman

THE FOREGOING RESOLUTION was adopted at a special meeting held on August 22, 1974, at which time 3 Council members were present, and was passed by a vote of 3 FOR and 0 AGAINST, the Chairman, or the Vice-Chairman in the Chairman's absence, being authorized to sign the Resolution.

/s/_____
Secretary

EXHIBIT 10.10 [to Pre-Trial Order]

Resolution No. S-3
Date Enacted August 30, 1974

RESOLUTION NO. S-3 OF THE
LUMMI BUSINESS COUNCIL

WHEREAS, the Lummi Business Council is the duly constituted governing body of the Lummi Indian Reservation by authority of the Constitution and By-Laws of the Lummi Tribe of the Lummi Reservation, Washington, as approved April 10, 1970, by the Assistant Commissioner of Indian Affairs; and,

WHEREAS, under the Constitution and By-Laws of the Tribe the Council is charged with the duty of safeguarding and promoting the peace, safety, morals and general welfare of the Lummi Tribe by regulating the conduct of trade and the use and disposition of property upon the Reservation; and,

WHEREAS, by virtue of its status as an Indian Tribe, the Lummi Tribe is authorized by federal law to possess unstamped cigarettes and other tobacco products on the Lummi Indian Reservation and to regulate their sale and distribution; and,

WHEREAS, the Lummi Business Council deems it essential to the peace, safety, morals, and general welfare of the Lummi Tribe to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Lummi Indian Reservation; and,

WHEREAS, the Lummi Business Council has heretofore adopted Lummi Tobacco Ordinance, Resolution No. P-35, but now wishes to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Lummi Business Council does

hereby promulgate and enact the following amended tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

ORDINANCE NO. L-40

Governing sale, distribution and
taxation of tobacco products
within the Lummi Indian Reservation

Section 1. Title.

This ordinance shall be known as the Lummi Tobacco Ordinance.

Section 2. Definitions.

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated.

(1) "Tribe" shall mean the Lummi Tribe of the Lummi Indian Reservation.

(2) "Council" shall mean the Lummi Business Council.

(3) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(4) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(5) "Retail Selling Price" shall mean the ordinary,

customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(6) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribe together with all freight charges and other expenses incurred by the Tribe in their receipt and distribution.

(7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Lummi Indian Reservation.

(8) "Operator" shall mean an enrolled member of the Lummi Indian Tribe licensed by the Tribe to manage a tobacco outlet.

Section 3. Establishment of Tobacco Outlets.

The Council shall establish one or more tobacco outlets within the Lummi Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

Section 4. Nature of Outlet.

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribe by an Operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a federal Indian traders license as provided in Section 7 hereof.

Section 5. Application for Tobacco Outlet License.

Any enrolled member of the Lummi Tribe may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

Section 6. Tobacco Outlet License.

Upon approval of an application, the Council shall

issue the applicant a tobacco outlet license for a five-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Lummi Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be non-transferable.

Section 7. Traders License.

Within 30 days after receipt of a tobacco outlet license, an operator must apply to the Superintendent of the Western Washington Indian Agency for a Federal Indian Trader's License. Failure of an operator to apply for or to obtain a Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

Section 8. Tax Imposed.

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of $.01 per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribe pursuant to Section 9 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arriving [*sic*] by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

Section 9. Wholesale Distribution.

Wholesale distribution of tobacco products by the Tribe to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

Section 10. Tobacco Products Federally Restricted Tribal Property.

The entire stock of tobacco products distributed hereunder shall remain federally restricted tribal property owned and possessed by the Tribe until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 9 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

Section 11. Remuneration to Operator.

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

Section 12. Restricted Sales to Non-Indians.

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as to [*sic*] deems necessary.

Section 13. Restricted Sales to Minors.

An operator may not sell any tobacco products to any person under the age of 18 years.

Section 14. Other Business by Operator.

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribe. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

Section 15. Tribal Immunity — Liability — Credit.

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribe from suit, nor

shall such operator attempt or be authorized to create any liability on behalf of the Tribe or to utilize tribal credit.

Section 16. Operating Without License.

No person shall operate a tobacco outlet on the Lummi Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

Section 17. Purchases.

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribe.

Section 18. Liability Insurance.

An operator shall maintain liability insurance upon his premises in the sum of $100,000.00.

Section 19. Revocation of Tobacco Outlet License.

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the penalties provided in Section 20 below.

Section 20. Violation — Penalties.

Upon application by the Chairman of the Council, the tribal judge shall issue an order directing the tribal law enforcement officer to seize all tobacco products from wherever purchased and by whomever owned from any tobacco outlet being operated in violation of this ordinance. Within three (3) days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in tribal court at which time the operator of such outlet shall be given the opportunity to present evidence in defense of his activities. If the tribal court shall determine by a preponderance of the evidence that such tobacco outlet was being operated in violation of this ordinance, the judge shall impose a fine of not less than $50.00 nor more than $250.00 in addition to the forfeiture of tobacco products described above.

Section 21. Recovery of Taxes Owed.

The Tribe shall have a cause of action in tribal court to recover any taxes owed and not paid to the Tribe in accordance with this or any previous ordinance.

Section 22. Separability.

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

CERTIFICATION

I certify as Secretary of the Lummi Business Council that the Lummi Business Council is composed of 11 members, 6 of whom, constituting a quorum, were present at a (regular) (special) meeting of the Council on August 30, 1974, held at Marietta, Washington, and that the foregoing Resolution was duly adopted at such meeting by a vote of 5 FOR and 0 AGAINST said Resolution.

/s/_____
Chairman

/s/_____
Tribal Secretary

EXHIBIT 10.19 [to Pre-Trial Order]

AFFIDAVIT OF RONALD C. TROSPER

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

RONALD L. TROSPER, being first duly sworn, on oath depose and says as follow:

1. Qualifications As An Expert Witness.

I am an economist and specialize in the area of American Indian economic development. I currently hold the position of Assistant Professor of Economics and Public Affairs at the University of Washington in Seattle, Washington. While at the University, I have taught the following courses: American Indian Economic Development Problems, Economics of Discrimination, Macro-Economics, Urban Economics, and Economic Development.

I received a Bachelor of Arts degree, magna cum laude, with a major in Social Studies from Harvard College in 1967. I received a Master of Arts in Economics at Harvard in 1970 and a PhD. in Economics at Harvard in 1974. The title of my PhD. dissertation at Harvard was "The Economic Impact of the Allotment Policy on the Flathead Indian Reservation."

My honors and fellowships include the following: Phi Beta Kappa, 1967; Woodrow Wilson Fellowship, 1967; Henry Fellowship, 1967; Danforth Graduate Fellowship, 1967; Ford Foundation Advance Study Fellowship for American Indians, 1972. I am a member of the American Economic Association and the Western Economic Association, was a special consultant on economic development to the American Indian Policy Review Commission in 1975-76, was a consultant to the Swinomish Tribal Community in 1975, and a consultant to the Confederated Salish and Kootenai Tribes in 1971 and 1972.

My publications include a discussion on past

developments and future prospects for ethnic minority groups in American Economic Review, May, 1975; Title I of the Indian Self-Determination and Education Assistance Act of 1975, 3 Am.Ind.L.Rev. 361 (1976); Native American Boundary Maintenance: The Flathead Indian Reservation, Montana: 1860-1970, 3 Ethnicity 256 (1976).

2. Economic Effects of Imposition of the State Cigarette and Tobacco Products Tax.

Counsel for the Colville, Lummi, and Makah Tribes, plaintiffs in this action, have requested me to study the economic impact of imposition of the State's Cigarette and Tobacco Products Tax and to express my opinion as to the probable economic results. I have on numerous occasions spoken with counsel for the plaintiffs Tribes and am familiar with the cigarette taxing ordinances of the Makah, Lummi, and Colville Tribes. I am also familiar with the State's Cigarette and Tobacco Products Tax and have examined the Jenkins Act Reports showing the volume of cigarette sales on their respective Reservations over the past years. I am familiar with the economic conditions on the plaintiffs' Reservations and with economic conditions on Indian reservations generally. In addition, I have examined and am familiar with the economic literature on the effect of differential tax rates on cigarette sales in various jurisdictions.

It is my opinion that if the State's cigarette tax of $.16 per pack is added to the price of cigarettes sold by the tribal outlets on the Colville, Lummi, and Makah Indian Reservations, the volume of cigarette sales on those Reservations will fall drastically. The basis for my opinion is as follows.

The State imposes a Cigarette and Tobacco Products Tax of $.16 per package of cigarettes sold. The Colville Indian Tribes imposes a cigarette tax of $.04 per package sold and the Lummi and Makah Indian Tribes impose a cigarette tax of $.05 per package of cigarettes sold. At the present time, the State's cigarette tax is imposed on all sales of cigarettes off the reservation, but has not been

successfully enforced on the reservations. If the State's Cigarette and Tobacco Products Tax were superimposed on the respective tribal taxes on cigarettes, it is clear that cigarettes sold on the Colville Reservation would bear a total excise tax burden of $.20 per package and cigarettes sold on the Lummi and Makah Reservations would bear a tax burden of $.21 per package. (For present purposes, this analysis does not include the impact of the State's sales tax. That is discussed separately below.)

The question of what will happen to the volume of cigarette sales on the reservations if the State tax were superimposed on the tribal tax can be described as a textbook case. Paul Samuelson and other economists point out that individual firms faced a highly "elastic" demand curve with respect to their own price in a competitive market. P. SAMUELSON, ECONOMICS 432-33 (8th Ed. 1970). A highly elastic demand curve means that large changes in the volume of sales will result from small changes in price. State and tribal cigarette taxes in this case determine the price differences between Indian and non-Indian retail cigarette outlets. For Indian retailers, the dramatic result of an elastic demand curve is that a small change in price will create a large change in sales volume.

It was established by Alexander C. Wiseman in his 1968 PhD. dissertation in economics at the University of Washington, entitled "The Demand For Cigarettes In the United States: Implications For State Tax Policy," that people will cross boundaries between tax jurisdictions to purchase cigarettes. Mr. Wiseman used data on cigarette consumption for 47 states and the District of Columbia for the years 1954 to 1965. This study enabled him to establish that price differences between Washington and Oregon in 1966 caused some 348,000 cartons to be purchased in Oregon by Washington residents in that year. *Id.* at 56. He also estimated that between Connecticut and New Hampshire, net sales to non-residents constituted about 14% of total sales, while for Vermont and Rhode Island between 9% and 10% of net sales were to

non-residents. *Id.* at 74. In 1966, the price difference between New York and Connecticut was about $.05 per pack and between Massachusetts and New Hampshire about $.07 per pack.

Mr. Wiseman's study confirms that people will travel to avoid paying cigarette taxes. The Connecticut/New Hampshire and Vermont/Rhode Island figures indicate that consumers were responding to differences of $.05 and $.07 per pack respectively. In Washington State, residents are responding to what is now an $.11 or $.12 cigarette tax differential per pack on the three plaintiffs Reservations. The large volume of cigarettes sold on these Reservations as revealed by the Jenkins Act Reports confirms that Washington consumers are in effect responding to price differences in precisely the manner that economic textbooks predict.

At present, the 5% State sales tax is not collected on sales of cigarettes on the Reservations, but is collected on sales of cigarettes off the Reservations. Thus, at present a non-Indian purchaser buying cigarettes on the Reservations is responding to a price differential that is several cents larger than the $.11 or $.12 excise tax difference described above. If the State's sales tax were enforced on the Reservations, but the State's Cigarette and Tobacco Products Tax were not enforced, the price differential would be approximately $.11 and $.12 as outlined above. If the Cigarette and Tobacco Products Tax were enforced, the present differential would be eliminated and a price differential against Indian sellers would be imposed. The differential created by the cigarette tax alone would be increased if the State sales tax were also imposed.

If non-Indians travel to the Reservations and purchase cigarettes there to benefit from the tax differential, they will cease such travel if the differential disappears or reverses direction. At present, non-Indian purchasers buying cigarettes on the Reservations have a net savings of $1.10 or $1.20 per carton from the cigarette tax differential alone. If the State's Cigarette and Tobacco

Products Tax were imposed, this savings would be turned into an additional expense, over and above the price of off-reservation cigarettes, of $.40 or $.50 per carton, a cost increase of 38% to 40% for current purchasers on the Reservations. If the two excise taxes were applied on the Reservations, the Indian tribal outlets would have a price disadvantage and could no longer successfully compete with nearby cigarette retailers located off the Reservations. The tribal outlets would probably have trouble covering basic operating expenses necessary to continue in business. At a minimum, it is certain that the large volumes of cigarettes sold at the Colville and Lummi Reservations to non-Indians would disappear. Imposition of the State sales tax as well would, of course, increase the competitive disadvantage of the tribal outlets.

/s/_____
RONALD L. TROSPER

[Jurat omitted in printing]

STATE'S MOTION FOR PARTIAL NEW TRIAL

Filed May 22, 1978
[Caption Omitted in Printing]

Pursuant to Fed. R. Civ. P. 59(a)(2), the defendants hereby move for a partial new trial, the new trial to be limited to the issue of the power of the State of Washington to impose (1) its cigarette tax (chapter 82.24 RCW and the administrative regulations promulgated thereunder) upon non-Indian purchasers from Indians and (2) its sales tax (chapter 82.08 and the administrative regulations promulgated thereupon) with respect to these same transactions.

As grounds for this motion, defendants rely upon two decisions of the United States Supreme Court which clarify the source, nature, and limits of tribal power over Indians and non-Indians, but which were rendered after the decision of this Court and were, accordingly, not available to this Court in its consideration of this case. Those decisions are *Oliphant v. Suquamish Tribe*, ____ U.S. ____ (46 LW 4210, March 6, 1978), and *United States v. Wheeler*, ____ U.S. ____ (46 LW 4243, March 22, 1978). Defendants further rely upon a decision of the 10th Circuit, rendered February 17, 1978, *Ute Indian Tribe v. State Tax Commission of the State of Utah*, No. 76-1602.

As will be shown in the brief of defendants to be filed herein, the grounds relied upon by the majority in that portion of its decision as to which a new trial is being requested are completely inconsistent with those decisions.

DATED this 19th day of May, 1978.

/s/_____
SLADE GORTON
Attorney General

/s/_____
MATTHEW J. COYLE
Assistant Attorney General

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed July 12, 1978
[Caption Omitted in Printing]

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, R. Y. Woodhouse, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State of Washington motor vehicle excise tax under RCW 82.44 and its mobile homes, travel trailers and campers excise tax under RCW 82.50, the administrative regulations promulgated thereunder and any enforcement thereof against any of the tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

(2) Granting a declaratory judgment that the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation's resident members are unlawful as a denial of equal protection under the United States Constitution.

(3) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington motor vehicle excise tax on its mobile homes, travel trailers and campers

excise tax upon any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.

2. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of July, 1978.

SLADE GORTON, Attorney General
State of Washington

By:/s/_____
MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Appellants-
Defendants

[Proof of Service Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed August 14, 1978
[Caption Omitted in Printing]

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, Jack G. Nelson, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against any of the Tribes or their respective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State's cigarette taxing scheme against any of the Tribes or their retail dealers.

2. The above-named defendants moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment stated above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.
DATED this 10th day of August, 1978.

SLADE GORTON, Attorney General
State of Washington

RICHARD H. HOLMQUIST
Sr. Assistant Attorney General

By/s/ _____
MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Appellants-
Defendants.

[Proof of Service Omitted in Printing]

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed September 8, 1978
[Caption Omitted in Printing]

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, Jack G. Nelson, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against any of the Tribes or their respective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State's cigarette taxing scheme against any of the Tribes or their retail dealers.

(3) A declaratory judgment that the imposition of the State of Washington motor vehicle excise tax under RCW 82.44 and its mobile homes, travel trailers and campers excise tax under RCW 82.50, the administrative regulations promulgated thereunder and any enforcement thereof against any of the tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on

their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

(4) Granting a declaratory judgment that the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation's resident members are unlawful as a denial of equal protection under the United States Constitution.

(5) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington motor vehicle excise tax on its mobile homes, travel trailers and campers excise tax upon any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.

2. The above-named defendants moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment contained in paragraph 1(1) and 1(2) above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 8th day of September, 1978.

SLADE GORTON, Attorney General
State of Washington

By:/s/_____
Matthew J. Coyle
Assistant Attorney General

Attorneys for Appellants-Defendants.

[Proof of Service Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 78-630

WASHINGTON, et al.,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, et al.

APPEAL from the United States District Court for the Eastern District of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

February 21, 1979

CAUSE NO. 3909 BELOW— THE *YAKIMA* CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Civil No. 3909

COMPLAINT

[Filed July 18, 1973]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF WASHINGTON,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The United States of America, by Dean C. Smith, United States Attorney for the Eastern District of Washington, acting under authority of 25 USCA §175 and of the Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

JURISDICTION AND CAUSE OF ACTION

1. This court has jurisdiction by reason of the fact that the United States is plaintiff 28 USC §1345.

2. The United States brings this action on behalf of the Confederated Bands and Tribes of the Yakima Indian Nation, hereinafter called "The Yakima Indian Nation".

Plaintiff entered into a Treaty with the Yakima Indian Nation on June 9, 1855. This Treaty was ratified on August 8, 1859. Among other things this Treaty established the dependence of the Yakima Indian Nation

on plaintiff, the recognition of this nation and that the property of this nation should be free from levy or attachment.

3. This is a civil action seeking declaratory judgment and injunctive relief against wrongful and unlawful actions undertaken and being undertaken, under color of law, by George Kinnear, Director of the State of Washington, Department of Revenue, his agents, officers, and employees to deprive, to diminish and to effect diminution and extinguishment of certain constitutional, treaty and legal rights of the Yakima Indian Nation to engage in Indian commerce. Declaratory judgment and injunctive relief is also sought against said defendant, its agents, officers and employees for their wrongful and unlawful acts and actions to tax and to levy taxes upon, to seize, to alienate, to encumber, and to regulate the real and personal properties of the Yakima Indian Nation and to levy against and restrict the trade and commerce of the Yakima Indian Nation and its personal properties, and to deprive the Yakima Indian Nation of its properties without due process of law and without lawful authority.

IDENTIFICATION OF THE PARTIES AND PARTY IN INTEREST

4. Plaintiff is the United States of America.

5. Defendant, State of Washington was admitted to the United States of America pursuant to Enabling Act of February 22, 1889 and the President's Proclamation of November 11, 1889.

6. The Yakima Indian Nation is an Indian tribe or Indian Nation established by Treaty with the United States of America, entitled *"Treaty with the Yakimas"*, 12 Stat. 951. The Yakima Indian Nation and its governing bodies are recognized by the Secretary of Interior. The Yakima Indian Nation has a membership of over six thousand, the majority of which live on the Yakima Indian Reservation which is located within the exterior boundaries of the State of Washington. This reservation was

reserved for the Yakima Indian Nation in the *"Treaty with the Yakimas"*, 12 Stat. 951. That the State of Washington has not assumed jurisdiction over the trust lands on the Yakima Reservation in any manner that would effect the outcome of this action.

Within the exterior boundaries of the Yakima Indian Reservation the Yakima Indian Nation in the exercise of its governmental powers and in pursuance of a duly enacted tribal ordinance, approved by the Secretary of Interior, does license and tax the sale of cigarettes and other tobacco products. Its licensees and their employees are all members of the Yakima Indian Nation enrolled under 18 USC §601 and their premises are all located on trust or restricted lands within the exterior boundaries of the Yakima Indian Nation. The Yakima Indian Nation also operates a tribal enterprise which regularly purchases cigarettes from a wholesale dealer in Idaho, and orders their delivery to a building on trust property on the Yakima Indian Reservation by means of interstate common carrier or transport. That thereafter the Yakima Indian Nation sells and delivers these cigarettes to its member licensees to their places of business. That thereafter these licensees resell these cigarettes at retail. That the Yakima Nation receives 1¢ per pack tax and charges 2¢ per pack mark-up on each pack so sold. These revenues are used by the Yakima Nation for general tribal programs.

CAUSE OF ACTION

7. That on May 5, 1972, defendant, its agents, officers and employees classified the Yakima Indian Nation as a taxpayer and assessed a tax of $304,582.40 against the Yakima Indian Nation together with a penalty of $304,582.40 and interest. That a copy of said attachment is attached hereto and marked Exhibit "A" and made a part of this complaint.

8. That thereafter on November 30, 1972 the defendant, its agents, officers and employees did issue a

warrant for unpaid taxes claiming an indebtedness from the Yakima Indian Nation to the defendant in the amount of $650,333.88. That this warrant levied upon the real and personal property of the Yakima Indian Nation. A copy of said warrant is marked Exhibit "B" attached hereto and made a part hereof.

9. That defendant, its agents, officers and employees on or about December 19, 1972 issued a Notice and Order to Withhold and Deliver (continuing levy) to Garrett Truck Lines, Inc. and other like common carriers regularly engaged in interstate commerce in the transporting of goods in established interstate highway transport routes that serve the Yakima Indian Reservation. That this notice and order demanded that all said carriers withhold from and deliver to the Washington State Department of Revenue all personal properties of the Yakima Indian Nation. That said notice and order is a continuing levy and provides that if the company should fail or refuse to comply that a judgment for $650,333.88 would be taken against them. That a copy of said notice and order is attached hereto marked Exhibit "C" and made a part hereof.

10. That pursuant to said notice and order Garrett Truck Lines did inform defendant that it had certain goods belonging to the Yakima Nation and the Department of Revenue seized these goods from regular interstate shipment (i.e. tobacco products) and sold them. That because Garrett Truck Lines and other interstate carriers and defendant have said the same continuing procedures would be followed, the Yakima Indian Nation has been forced to cease doing business in this tribal enterprise.

11. That the foregoing action of the defendant, its agents, officers and employees is unlawful and improper in the following respects:

a. Defendant's actions are an unconstitutional interference with Indian commerce.

b. Defendant is unlawfully exceeding its jurisdiction.

c. Defendant's actions are an unconstitutional interference with commerce with and upon an Indian Reservation.

d. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the commerce in and to Indian Reservations.

e. Defendant's actions are an unlawful interference with the internal affairs of the Yakima Indian Nation.

f. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms under which the State of Washington gained admission to the Union.

g. Defendant's actions are destructive of the commerce of the Yakima Indian Nation and fail to provide the Yakima Nation with due process of law.

12. The plaintiff and the Yakima Indian Nation do not have an adequate remedy at law because the amount of the assessment grossly exceeds the Yakima Indian Nation's revenue from the handling of cigarettes and it is therefore impossible for the tribe to pay the tax and sue for recovery.

13. That an actual controversy exists between the plaintiff on one hand and the defendant on the other as to the nature and extent of the Yakima Indian Nation's right to engage in commerce without taxation, levy or attachment.

WHEREFORE, plaintiff prays that this court, after hearing:

a. Declare that the Yakima Indian Nation's activity in trade and commerce, as it involves the purchase at wholesale of cigarettes for delivery to the Yakima Indian Reservation for the Yakima Nation's use, including commercial disposition of such commodities is an activity protected against any interfer-

ence, regulation, imposition of taxes or levy, seizure or sale of properties involved or incident thereto, by any allegation or exercise of authority by defendant and its agents, officers and employees.

b. Declare that the "Order Assessing Tax and Notice of Assessment" and "Warrant for Unpaid Taxes" issued by defendant against the Yakima Nation constitutes an unlawful levy of taxes.

c. Declare that the several "Notice and Order to Withhold and Deliver '(continuing levy) Orders" issued by defendant against numerous companies, businesses, and corporations regularly engaged and doing business in interstate commerce and transport are invalid and unenforceable for levying upon, attaching, or commanding delivery of the Yakima Indian Nation's personal or other properties to the Department of Revenue of the State of Washington.

d. Issue preliminary and permanent injunctions against defendant, its agents, officers and employees enjoining them from engaging in any action or acting in any manner to stop, prevent, or interfere with Yakima Indian Nation's transactions and business activities in Indian commerce, and from acting in any manner to stop, prevent or interfere with the transport or delivery of properties purchased by the Yakima Indian Nation for delivery to the Yakima Indian Reservation, and enjoining defendant from acting in any manner to levy taxes upon the properties of the Yakima Nation when transported or moved in commerce, and enjoining defendant from acting in any manner to seize or to receive into its possession any of the properties of the Yakima Indian Nation being moved or which may be moved or transported in commerce, and enjoining defendant from acting in any manner to enforce, or give effect to, any assessments, levies, taxation orders, warrants, or claims against the real or personal properties of the Yakima Indian Nation heretofore issued by defendant or which may be hereafter issued to restrict, prevent or interfere with Yakima Indian Nation's transactions or business in securing delivery of commodities in Indian commerce.

For such other and further relief as the court deems just and equitable.

/s/_____
DEAN C. SMITH
United States Attorney

851 U.S. Courthouse
P.O. Box 1494
Spokane, Washington 99210

* * * *

[Exhibit A (Tax Assessment) omitted in printing]

[Exhibit B (Tax Warrant) omitted in printing]

[Exhibit C (Notice and Order to Withhold and Deliver) omitted in printing]

PETITION FOR DETERMINATION BY A THREE JUDGE COURT

Filed July 19, 1973
[Caption omitted in printing]

COMES Now Dean C. Smith, United States Attorney for the Eastern District of Washington on behalf of the plaintiff United States of America and petitions the court for a determination in this cause by a three judge court under the provisions 28 USC §§2281 and 2284.

This petition is based upon the allegations of the complaint in which the relief requested is a preliminary injunction as well as a permanent injunction restraining the enforcement of a state statute. Such relief is requested on the grounds of the unconstitutionality of a state statute.

DATED July 19, 1973.

/s/_____
Dean C. Smith
United States Attorney

CERTIFICATE REQUESTING THREE-JUDGE COURT

Filed July 20, 1973
[Caption omitted in printing]

To: The Honorable Richard H. Chambers, Chief Judge
United States Court of Appeals for the Ninth Circuit

The plaintiff has filed its complaint and application for convening a three-judge court under 28 USC §2281 et seq. The prayer of the complaint asks for an injunction against the enforcement of the revenue laws of the State of Washington on the Yakima Indian Reservation as an unconstitutional interference with interstate commerce and deprivation of property without due process of law.

I certify that a three-judge court is necessary and request that you constitute such a court in this district by the designation of the required Circuit Court Judge and additional District Court Judge.

DATED this 20th day of July, 1973.

/s/_____
Charles L. Powell
United States District Judge

TEMPORARY RESTRAINING ORDER

Entered November 5, 1973
[Caption omitted in printing]

THIS MATTER having come on for hearing upon plaintiff's Motion for Temporary Restraining Order, the plaintiff being represented by Dean C. Smith, United States Attorney for the Eastern District of Washington, and the defendant being represented by William Dexter, Assistant Attorney General for the State of Washington, and the Court having considered the affidavits and records herein and after hearing argument and being fully advised in the premises

The Court hereby finds as follows: The Yakima Indian Nation and the individual licensed retail dealers in cigarettes on the reservation have suffered and are suffering serious losses in revenue constituting irreparable damage, necessitating the entry of a temporary restraining order to restore the status quo which existed at the time the defendant State of Washington instituted the program of seizure of cigarettes and tobacco products.

Based upon the foregoing findings,

IT IS ORDERED that the defendant, State of Washington, its officers, agents and servants are hereby restrained until the determination by this Court of plaintiff's Motion for Preliminary Injunction or until otherwise ordered by the Court from engaging in any action or acting in any manner to assess a tax upon or seize any cigarettes, tobacco products or their containers, or confiscate any such cigarettes, tobacco products or their containers being shipped or delivered to the Yakima Indian Nation by licensed carrier in interstate commerce from outside the State of Washington or distributed by the Yakima Nation on the Reservation to its licensed retailers for resale on trust or restricted land within the exterior boundaries of the Yakima Indian Reservation.

DATED November 5, 1973.

/s/_____
Charles L. Powell
United States District Judge

Presented by:

/s/_____
Dean C. Smith
United States Attorney

COMPLAINT IN INTERVENTION

Filed April 24, 1974
[Caption Omitted in Printing]

COMPLAINT IN INTERVENTION
FOR DECLARATORY JUDGMENT,
DAMAGES AND INJUNCTION

The Confederated Bands and Tribe of the Yakima Indian Nation, hereinafter called "Yakima Nation", a tribe or nation of Indians recognized by the United States and its Secretary of Interior, for its complaint in intervention as a party plaintiff alleges:

JURISDICTION AND CAUSE OF ACTION

1. This court has jurisdiction by virtue of:

a. 28 U.S.C. § 1345, in that the United States brings this action on its own behalf and on behalf of the Yakima Nation, a federally recognized Indian tribe in connection with its administration of Indian affairs.

b. 28 U.S.C. § 1331, in that the matter in controversy involves the rights of said plaintiff Yakima Nation which has a value in excess of $10,000, exclusive of interest and costs, and are claimed to exist and to be secured under the Constitution, laws and treaties of the United States.

c. 28 U.S.C. § 1343 (3) and (4), in that the Yakima Nation alleges that Defendant State of Washington, and [*sic*] has, under color of state law, regulation, custom and usage, deprived them of rights secured to them in the treaties cited in paragraph 5 and under the Constitution of the United States, and those tribes seek equitable relief and damages for that deprivation.

d. 28 U.S.C. § 1362, as the Yakima Nation has a governing body duly recognized by the Secretary of the Interior in that this action in intervention is brought on its own behalf alleging violations of its rights under the Constitution, laws and treaties of the United States.

2. This is a civil action seeking declaratory judgment,

damages and injunctive relief against wrongful and unlawful actions undertaken and being undertaken, under color of law, by defendant, State of Washington, its officials, officers, and employees to deprive, to diminish and to effect diminution and extinguishment of certain constitutional, treaty, legal and inherent rights of the Yakima Indian Nation to engage in interstate commerce and in Indian commerce. Declaratory judgment, damages and injunctive relief is also sought against defendant State of Washington, its officials, officers and employees, their wrongful and unlawful acts and actions to tax and to levy taxes upon, to seize, to alienate, to encumber, and to regulate the real and personal properties of the Yakima Indian Nation and to levy against and restrict the trade and commerce of the Yakima Indian Nation and its personal properties, and to deprive the Yakima Indian Nation of its properties without due process of law and without lawful authority.

IDENTIFICATION OF THE PARTIES AND PARTY IN INTEREST

3. Plaintiff is the United States of America.

4. Defendant is a state that was admitted to the United States of America pursuant to Enabling Act of February 22, 1889 and the President's Proclamation of November 11, 1889.

5. Plaintiff-Intervenor, the Yakima Indian Nation, is an Indian tribe or Indian Nation established by Treaty with the United States of America *Treaty with the Yakimas*, 12 Stat. 951. The Yakima Indian Nation and its governing bodies are recognized by the Secretary of Interior. The Yakima Indian Nation has a membership of over six thousand, the majority of which live on the Yakima Indian Reservation which is located within the exterior boundaries of the State of Washington. This reservation has approximately 1,387,505 acres within its exterior boundary, of which all but approximately 270,895 are held in trust or restricted status by the United States

of America as trustee for the Yakima Indian Nation, its members or other Indians. This reservation was reserved for the Yakima Indian Nation in the *Treaty with the Yakimas*, 12 Stat. 951. That the State of Washington has not assumed jurisdiction over the trust lands on the Yakima Reservation in any manner that would effect the outcome of this action.

Within the exterior boundaries of the Yakima Indian Reservation the Yakima Indian Nation in the exercise of its governmental powers does license and tax the sale of cigarettes and other tobacco products. Its licensees and their employees are all members of the Yakima Indian Nation enrolled under 25 USC 601 and their premises are all located on trust or restricted lands within the exterior boundaries of the Yakima Indian Nation. The Yakima Indian Nation also operates a tribal enterprise which regularly purchases cigarettes from a wholesale dealer in Idaho, and orders their delivery to a building on trust property on the Yakima Indian Reservation by means of interstate common carrier or transport. That thereafter the Yakima Indian Nation sells and delivers these cigarettes to its member licensees to their places of business. That thereafter these licensees resell these cigarettes at retail. That the Yakima Nation receives a tax and a return on each pack so sold. These revenues are used by the Yakima Nation for general tribal programs.

CAUSE OF ACTION

6. That on May 5, 1972, defendant, its officials, officers and employees classified the Yakima Indian Nation as a taxpayer and assessed a tax of $304,582.40 against the Yakima Indian Nation together with a penalty of $304,582.40 and interest. This is an assessment of over 32¢ per pack on each and every pack purchased and sold by the Yakima Indian Nation during the months of March and April 1972. That a copy of said attachment is attached to plaintiff's complaint, marked Exhibit "A" and made a part of this complaint by this reference.

7. That thereafter on November 30, 1972 the defendant, its officials, officers and employees did swear out and issue a warrant for unpaid taxes claiming an indebtedness from the Yakima Indian Nation to the defendant in the amount of $650,333.88. That this warrant wrongfully and unlawfully levied upon the real and personal property of the Yakima Indian Nation. A copy of said warrant is attached to plaintiff's complaint marked Exhibit "B" and made a part of this complaint by this reference.

8. That defendant, its officials, officers and employees on or about December 19, 1972 issued a Notice and Order to Withhold and Deliver (continuing levy) to Garrett Truck Lines, Inc. and other like common carriers regularly engaged in interstate commerce, hauling, shipping, transport and transportation of goods in established interstate highway transport routes that would serve the Yakima Indian Reservation. That this notice and order demanded that all said carriers withhold from and deliver to the State Department of Revenue all personal properties of the Yakima Indian Nation. That said notice and order is a continuing levy and provides that if the company should fail or refuse to comply that a judgment for $650,333.88 would be taken against them. That a copy of said notice and order is attached to plaintiff's complaint marked Exhibit "C" and made a part of this complaint by this reference.

9. That pursuant to said notice and order Garrett Truck Lines did inform defendant that they had certain goods belonging to the Yakima Nation and defendant through its Department of Revenue seized these goods from regular interstate shipment (i.e. tobacco products) and sold them. That because Garrett Truck Lines and other interstate carriers and defendant have said the same continuing procedure would be followed, the Yakima Indian Nation ceased doing business in this tribal enterprise until such time as a temporary restraining order was granted by this court.

10. That during this period, plaintiff-intervenor lost an amount of $15,268.56 per month in income because of this action by the State, its agents and servants and will continue to lose a larger sum during any period that its operation must cease.

11. That the foregoing action of the defendant, its officials, officers and employees is unlawful and improper in the following respects:

A. Defendants actions are an unconstitutional interference with Indian and interstate commerce.

B. Defendant is attempting to make the Yakima Indian Nation a taxpayer contrary to state and federal law.

C. Defendant is unlawfully exceeding its jurisdiction.

D. Defendant's actions are an unconstitutional interference with commerce to and upon Indian Reservation.

E. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the commerce of cigarettes in and to Indian Reservations.

F. Defendant's actions are an unlawful interference with the internal affairs and inherent sovereignty of the Yakima Indian Nation.

G. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms of Defendant's admission to the Union.

H. Defendant's actions are unlawfully confiscatory, destructive of the commerce of the Yakima Indian Nation and fail to provide the Yakima Nation with due process of law or equal protection of the laws pursuant to the United States Constitution.

12. The plaintiff and the Yakima Indian Nation do not have an adequate remedy at law because the amount of the assessment as compared to the margin collected that the payment of the tax and suing for relief is not possible.

13. That an actual controversy exists between the

plaintiff on one hand and the defendant on the other as to the nature and extent of the Yakima Indian Nation's right to engage in interstate commerce without taxation, levy or attachment.

WHEREFORE, plaintiff's pray that this court, after hearing:

A. Declare that the Yakima Indian Nation's activity in trade and commerce, as involves and is characterized by the purchase of wholesale saleable commodities (such as cigarettes) by plaintiff in places outside the State of Washington, with shipment or transport in delivery of such commodities being made by interstate common carrier of companies licensed and engaged in contracts and servicing established interstate commerce route for delivers [*sic*] to the Yakima Indian Reservation for the Yakima Nation's use, including commercial disposition, of such commodities and properties, are activities protected against any interference, imposition of taxes or levy, seizure or sale of properties involved or incident thereto, by any allegation or exercise of authority by defendants, the State of Washington, and its officials, officers and employees.

B. Declare that the "order Assessing Tax and Notice of Assessment" and "Warrant for Unpaid Taxes" issued by defendants against the Yakima Nation constitutes an unlawful levy of taxes and false claim of tax indebtedness.

C. Declare that the several "Notice and Order to Withhold and Deliver (continuing levy)" issued by defendants against numerous companies, businesses, and corporations regularly engaged and doing business in interstate commerce and transport are invalid and unenforceable for levying upon, attaching, or commanding delivery of plaintiffs' personal or other properties to the Department of Revenue of the State of Washington.

D. Issue preliminary and permanent injunctions against defendant, its officials, officers and employees enjoining said defendants from engaging in any action or acting in any manner to stop, prevent, or interfere with

Yakima Indian Nation's transactions and business activities in Indian commerce and interstate commerce, and from acting in any manner to stop, prevent or interfere with the transport or delivery of properties purchased by plaintiffs out of state for delivery to the Yakima Indian Reservation, and enjoining defendants from acting in any manner to levy taxes upon the properties of the Yakima Nation when transported or moved in interstate commerce of Indian commerce, and enjoining defendants from acting in any manner to seize or to receive into their possession any of properties of the Yakima Indian Nation being moved or which may be moved or transported in Indian or interstate commerce, and enjoining defendants from acting in any manner to enforce, or give effect to, any assessments, levies, taxations orders, warrants, or claims against the real or personal properties of the Yakima Indian Nation heretofore issued by defendant or which may be hereafter issued to restrict, prevent or interfere with Yakima Indian Nation transactions or business in securing delivery of properties by interstate commerce or by engaging in Indian commerce.

E. For damages for the cession of tribal enterprise in an amount to be ascertained at trial of this cause.

F. For such other and further relief as the court deems just and equitable.

/s/_____
James B. Hovis
Attorney for Plaintiff-
Intervenor

ORDER GRANTING PRELIMINARY INJUNCTION

Entered September 6, 1974
[Caption Omitted in Printing]

THIS MATTER having come on for hearing upon plaintiff's application for issuance of a preliminary injunction, and on the complaint of plaintiff, the plaintiff being represented by Dean C. Smith, United States Attorney for the Eastern District of Washington, the defendant being represented by William D. Dexter, Assistant Attorney General for the State of Washington, and the plaintiff-intervenor being represented by James B. Hovis, Attorney at Law, and the Court having considered the affidavits and records herein and after hearing argument and being fully advised in the premises, and it appearing to the Court that in all probability the plaintiff will prevail upon the merits, and that the Yakima Indian Nation and its licensed Indian retailers have suffered and will continue to suffer serious losses in revenue constituting irreparable damage necessitating the entry of a preliminary injunction,

The stipulated facts contained in the Agreed Pre-Trial Order filed herein on September 3, 1974 are adopted by the Court as its findings in support of this order.

IT IS HEREBY ORDERED that defendant State of Washington, its officers, agents, servants, employees and attorneys, and those in active concert or participation with them, are hereby enjoined and restrained from engaging in any action or acting in any manner against the Yakima Indian Nation to collect or levy a cigarette tax on any cigarettes or tobacco products being shipped or delivered to the Yakima Indian Nation by licensed carrier in interstate commerce from outside the State of Washington and which are distributed by the Yakima Indian Nation on the Yakima Indian Reservation to its licensed retailers for resale on trust or restricted land within the exterior

boundaries of the Yakima Indian Reservation pending the determination of this action.

DONE BY THE COURT this 6th day of September, 1974.

/s/_____
John F. Kilkenny
United States Circuit Judge

/s/_____
William G. East
United States District Judge

/s/_____
Howard B. Turrentine
United States District Judge

* * * *

AMENDED COMPLAINT

Filed October 4, 1974
[Caption omitted in printing]

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The United States of America, by Dean C. Smith, United States Attorney for the Eastern District of Washington, acting under authority of 25 USC §175 and of the Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

JURISDICTION AND CAUSE OF ACTION

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff, 28 USC §1345.

2. The United States brings this action on behalf of the Confederated Bands and Tribes of the Yakima Indian Nation, hereinafter called "The Yakima Indian Nation", and the licensed Indian retailers of the Yakima Indian Nation.

Plaintiff entered into a Treaty with the Yakima Indian Nation on June 9, 1855. This Treaty was ratified on August 8, 1859. Among other things this Treaty established the dependence of the Yakima Indian Nation on plaintiff, the recognition of this nation and that the property of this nation should be free from levy or attachment.

3. This is a civil action seeking declaratory judgment and injunctive relief against wrongful and unlawful actions undertaken and being undertaken, under color of law, by George Kinnear, Director of the State of Washington, Department of Revenue, his agents, officers and employees to deprive, to diminish and to effect diminution and extinguishment of certain constitutional, treaty and legal rights of the Yakima Indian Nation and the licensed Indian retailers of the Yakima Indian Nation, to engage in Indian commerce. Declaratory judgment and injunctive

relief is also sought against said defendant, its agents, officers and employees for their wrongful and unlawful acts and actions to tax and to levy taxes upon, to seize, to alienate, to encumber and to regulate the real and personal properties of the Yakima Indian Nation, or its licensed Indian retailers, and to levy against and to restrict the trade and commerce of the Yakima Indian Nation and its personal properties, or its licensed Indian retailers and their properties, and to deprive the Yakima Indian Nation of its properties, or the licensed Indian retailers of their properties, without due process of law and without lawful authority.

IDENTIFICATION OF THE PARTIES AND PARTY IN INTEREST

4. Plaintiff is the United States of America.

5. Defendant, State of Washington, was admitted to the United States of America pursuant to Enabling Act of February 22, 1889 and the President's Proclamation of November 11, 1889.

6. Intervenor-Plaintiff is Confederated Bands and Tribes of the Yakima Indian Nation.

7. The Yakima Indian Nation is an Indian tribe or Indian Nation established by Treaty with the United States of America, entitled *"Treaty with the Yakimas"*, 12 Stat. 951. The Yakima Indian Nation and its governing bodies are recognized by the Secretary of Interior. The Yakima Indian Nation has a membership of over 6,000, the majority of which live on the Yakima Indian Reservation which is located within the exterior boundaries of the State of Washington. This reservation was reserved for the Yakima Indian Nation in the *"Treaty with the Yakimas,"* 12 Stat. 951. (That the State of Washington has not assumed jurisdiction over the trust lands on the Yakima Reservation in any manner that would effect the outcome of this action.)

Within the exterior boundaries of the Yakima Indian Reservation, the Yakima Indian Nation, in the exercise of

its governmental powers and in pursuance of a duly enacted tribal ordinance, approved by the Secretary of Interior, does license and tax the sale of cigarettes and other tobacco products. Its licensed Indian retailers and their employees are all members of the Yakima Indian Nation enrolled under 18 USC §601 and their premises are all located on trust or restricted lands within the exterior boundaries of the Yakima Indian Nation. The Yakima Indian Nation also operates a tribal enterprise which regularly purchases cigarettes from a wholesale dealer in Idaho and orders their delivery to a building on trust property on the Yakima Indian Reservation by means of interstate common carrier or transport, that thereafter the Yakima Indian Nation sells and delivers these cigarettes to its member licensed retailers to their places of business, that thereafter these licensed Indian retailers resell these cigarettes at retail. That the Yakima Nation receives $.01 per pack tax and charges $.02 per pack markup on each pack so sold. These revenues are used by the Yakima Nation for general tribal programs.

CAUSE OF ACTION

8. That on May 5, 1972 defendant, its agents, officers and employees classified the Yakima Indian Nation as a taxpayer and assessed a tax of $304,582.40 against the Yakima Indian Nation together with a penalty of $394,582.40 and interest. That a copy of said attachment is attached hereto and marked Exhibit "A" and made a part of this Amended Complaint.

9. That thereafter on November 30, 1972 the defendant, its agents, officers and employees did issue a warrant for unpaid taxes claiming an indebtedness from the Yakima Indian Nation to the defendant in the amount of $650,333.88. That this warrant levied upon the real and personal property of the Yakima Indian Nation. A copy of said warrant is marked Exhibit "B" attached hereto and made a part hereof.

10. That defendant, its agents, officers and employees

on or about December 19, 1972 issued a Notice and Order to Withhold and Deliver (continuing levy) to Garrett Truck Lines, Inc. and other like common carriers regularly engaged in interstate commerce in the transporting of goods in established interstate highway transport routes that serve the Yakima Indian Reservation. That this notice and order demanded that all said carriers withhold from and deliver to the Washington State Department of Revenue all personal properties of the Yakima Indian Nation. That said notice and order is a continuing levy and provides that if the company should fail or refuse to comply that a judgment for $650,333.88 would be taken against them. That a copy of said notice and order is attached hereto marked Exhibit "C" and made a part hereof.

11. That pursuant to said notice and order Garrett Truck Lines did inform defendant that it had certain goods belonging to the Yakima Indian Nation, and the Department of Revenue seized these goods from regular interstate shipment (i.e. tobacco products) and sold them. That because Garrett Truck Lines and other interstate carriers and defendant have said the same continuing procedures would be followed, the Yakima Indian Nation has been forced to cease doing business in this tribal enterprise. Similarly, the licensed Indian retailers of the Yakima Indian Nation have been forced to cease selling tobacco products.

12. That the defendant has threatened similar actions against the licensed Indian retailers of the Yakima Indian Nation, and the defendant actually has seized tobacco products from individual Indian retailers who are members of other tribes and bands and located within other Indian reservations.

13. That on August 23, 1974 the Washington State Department of Revenue, through an emergency provision, amended its regulations pertaining to the state sales tax. The amendment removes the sales tax exemption that the licensed Indian retailers of the Yakima Indian Nation had enjoyed under the prior state regulation on retail sales

made within the exterior boundaries of the Yakima Indian Reservation. The defendant mailed notices to the individual retailers detailing this change and enclosing forms which must be completed and returned to the defendant within thirty (30) days. Said notices threaten that failure to comply will expose the individual licensed Indian retailers to such enforcement provisions as Washington law prescribes.

14. That the foregoing action of the defendant, its agents, officers and employees is unlawful and improper in the following respects:

a. Defendant's actions are an unconstitutional interference with Indian commerce.

b. Defendant is unlawfully exceeding its jurisdiction.

c. Defendant's actions are an unconstitutional interference with commerce with and upon an Indian Reservation.

d. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the Commerce in and to Indian Reservations.

e. Defendant's actions are an unlawful interference with the internal affairs of the Yakima Indian Nation and the licensed Indian retailers of the Yakima Indian Nation.

f. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms under which the State of Washington gained admission to the Union.

g. Defendant's actions are destructive of the commerce of the Yakima Indian Nation and its licensed Indian retailers and fail to provide the Yakima Indian Nation and its licensed Indian retailers with due process of law.

15. The plaintiff, the Yakima Indian Nation, and the licensed Indian retailers of the Yakima Indian Nation do not have an adequate remedy at law because the amount of the assessment grossly exceeds the Yakima Indian Nation's revenue from the handling of cigarettes and it is therefore impossible for the tribe, or individual Indian retailers, to pay the tax and sue for recovery.

16. That an actual controversy exists between the plaintiff on one hand and the defendant on the other as to the nature and extent not only of the Yakima Indian Nation's right, but also of its's licensed Indian retailers' right, to engage in commerce without taxation, levy or attachment.

WHEREFORE, plaintiff prays that this Court after hearing:

a. Declare that the Yakima Indian Nation's activity and the activity of its licensed Indian retailers in trade and commerce, as it involves the purchase of wholesale of cigarettes[*sic*] for delivery to the Yakima Indian Reservation for the Yakima Indian Nation's use including commercial disposition of such commodities through sale of said products by licensed Indian retailers on reservation land to Indian and non-Indian purchasers alike, is an activity protected against any interference, regulation, imposition of taxes or levy, seizure or sale of properties involved or incident thereto by any allegation or exercise of authority by defendant and its agents, officers and employees.

b. Declare that the "Order Assessing Tax and Notice of Assessment" and "Warrant for Unpaid Taxes" issued by defendant against the Yakima Indian Nation constitutes an unlawful levy of taxes.

c. Declare that the several "Notice and Order to Withhold and Deliver (continuing levy)" orders issued by defendant against numerous companies, businesses and corporations regularly engaged and doing business in interstate commerce and transport are

invalid and unenforceable for levying upon, attaching or commanding delivery of the Yakima Indian Nation's personal or other properties to the Department of Revenue of the State of Washington.

d. Declare that the licensed Indian retailers' activity in trade and commerce within the exterior boundaries of the Yakima Indian Reservation through commercial disposition of commodities, goods and services to Indian and non-Indian purchasers is an activity protected against any interference, regulation or imposition of the Washington State sales tax by its agents, officers and employees.

e. Issue preliminary and permanent injunctions against defendant, its agents, officers and employees enjoining them from engaging in any action or acting in any manner to stop, prevent or interfere with Yakima Indian Nation's transactions and business activities, or the transactions and business activities of its licensed Indian retailers in Indian commerce and from acting in any manner to stop, prevent or interfere with the transport or delivery of properties purchased by the Yakima Indian Nation for delivery to the Yakima Indian Reservation and enjoining defendant from acting in any manner to levy taxes upon the properties of the Yakima Indian Nation when transported or moved in commerce, and enjoining defendant from acting in any manner to assess or levy taxes upon the individual licensed Indian retailers upon their sales of tobacco products to Indian or non-Indian purchasers, and enjoining defendant from acting in any manner to seize or to receive into its possession any of the properties of the Yakima Indian Nation, or its licensed Indian retailers, being moved or which may be moved or transported in commerce, or which is sold or may be sold pursuant to tribal ordinance by licensed Indian retailers upon the Yakima Indian Reservation to either Indian or non-Indian purchasers, and enjoining defendant from

acting in any manner to enforce, or give effect to, any assessments, levies, taxation orders, warrants, or claims against the real or personal properties of the Yakima Indian Nation heretofore issued by defendant or which may be hereafter issued to restrict, prevent or interfere with Yakima Indian Nation's transactions or business in securing delivery of commodities in Indian commerce and enjoining defendant from imposing any sales tax upon the commercial disposition within the Yakima Indian Reservation of goods, commodities or services by the licensed Indian retailers of the Yakima Indian Nation to either Indian or non-Indian purchasers.

f. For such other and further relief as the Court deems just and equitable.

/s/_____

DEAN C. SMITH
United States Attorney

851 U.S. Court House
P.O. Box 1494
Spokane, Wa. 99210

Telephone: 509-456-3811

* * * *

[Exhibit A (Tax Assessment) omitted in printing]

[Exhibit B (Tax Warrant) omitted in printing]

[Exhibit C (Notice and Order to Withhold and Deliver) omitted in printing]

[EXHIBIT D TO AMENDED COMPLAINT]

EXCERPT FROM UNITED STATES CODE, TITLE 15 — COMMERCE AND TRADE

SEC. 1673. RESTRICTION ON GARNISHMENT — MAXIMUM ALLOWABLE GARNISHMENT

"Exceptions

(b) The restrictions of subsection (a) of this section do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax."

EXCERPT FROM REVISED CODE, 82.32.235:

"Any person, or any political subdivision or department upon whom service has been made is hereby required to answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice.

"In the event there is in possession of any such person or political subdivision or department, any property which may be subject to the claim of the department of revenue, such property shall be delivered forthwith to the department or its duly authorized representative upon demand to be held in trust by the department for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or nonliability, or in the alternative, there shall be furnished a good and sufficient bond satisfactory to the department of revenue conditional upon final determination of liability.

"Should any person or political subdivision fail to make answer to an order to withhold and deliver within the time prescribed herein, it shall be lawful for the court, after the time to answer such order has expired, to render judgment by default against such person or political subdivision for the full amount claimed by the department of revenue in the notice to withhold and deliver, together with costs."

EXCERPT FROM DEPARTMENT OF REVENUE RULE 217:

"WITHHOLD AND DELIVER

"The Department of Revenue is authorized to issue to any person, or to any political subdivision or department of the state, a notice and order to withhold and deliver property of any kind whatsoever when there is reason to believe that there is in the possession of such person, political subdivision or department, property which is *or shall become* due, owing or belonging to any taxpayer against whom a warrant has been filed. *The notice and order to withhold and deliver shall constitute a continuing levy on such property until the department shall issue its release of such levy.*

"The notice and order to withhold and deliver may be served by the sheriff of the county wherein service is made, or by his deputy, or by any authorized representative of the Department of Revenue. Persons upon whom service has been made are required to answer the notice within twenty days exclusive of the day of service. The answer must be under oath and in writing. *If such answer states that it cannot be presently ascertained whether, in fact, any property is or shall become due, owing or belonging to such taxpayer, the persons served herein are required to further answer when such fact can be ascertained with reasonable certainty.*"

SUPPLEMENTAL PRE-TRIAL ORDER

Filed February 28, 1977
[Caption Omitted in Printing]

As a result of several pre-trial conferences held in the above-entitled cause before the three judge panel convened under 28 U.S.C. §2281, this supplemental pre-trial order has been formulated and settled as follows:

1. NATURE OF PROCEEDINGS

1.1 **Jurisdiction of the Court.** This court has jurisdiction of this cause pursuant to 28 U.S.C. §1345 because the United States is plaintiff. In addition, this court has jurisdiction of this cause pursuant to 28 U.S.C. §1362 because the Intervenor-plaintiff, the Confederated Tribes and Bands of the Yakima Indian Nation (hereinafter "Tribe"), is an Indian tribe with a governing body duly recognized by the Secretary of the Interior, and the matter in controversy arises under the constitution, laws, and treaties of the United States. Jurisdiction of this court is not defeated with respect to plaintiff and intervenor-plaintiff by 28 U.S.C. §1341.

1.2 **Three Judge Court.** A three judge court was convened pursuant to 28 U.S.C. §2281 on June 18, 1973, on the grounds that plaintiff's complaint sought to enjoin the enforcement of state statutes alleged to be in violation of the Commerce Clause, Art. I, Sec. 8, Cl. 3, of the United States Constitution.

1.3 **Nature of the Case.** This is a civil action seeking declaratory and injunctive relief against the enforcement of Washington state laws dealing with cigarette, tobacco products, and sales taxes on sales by the Tribe and by licensed Indian retailers of the Tribe to persons who are not members of the Tribe at locations within the exterior boundaries of the Yakima Indian Reservation. The action was originally brought by the United States on behalf of the Tribe and the licensed

Indian retailers of the Tribe. The Tribe, with the agreement of counsel for the United States and the State of Washington (hereafter "State"), intervened on its own behalf as a plaintiff.

2. **RELIEF SOUGHT BY PLAINTIFF.** Plaintiff United States seeks declaratory and injunctive relief:

2.1 **Taxes on Products Shipped to Tribe for Resale to Non-Members.** Against the imposition of state cigarette, tobacco products, and sales taxes on products being shipped from outside the State to trust land on the Yakima Indian Reservation consigned to the Tribe where such products are eventually resold to licensed Indian retailers who then sell such products on trust land within the Yakima Indian Reservation to persons other than members of the Tribe.

2.2 **Threatened Seizure of Shipments to Tribe.** Against the State, its agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband cigarettes and tobacco products upon which state taxes have not been paid being shipped from outside the State to the Tribe intended for resale to licensed Indian retailers on trust property within the Yakima Indian Reservation for eventual resale to persons who are not members of the Tribe.

2.3 **Threatened Seizure of Products of Retailers.** Against the State, its officers, agents and employees in threatening and attempting to levy upon and seize real and personal properties of licensed Indian retailers of the Tribe to satisfy cigarette, tobacco products, and sales taxes assessed against such licensed Indian retailers.

2.4 **Sales Tax on Sales to Non-Members of Tribe.** Against the State, its officers, agents and employees for their allegedly unlawful actions in attempting to enforce the state sales tax upon sales of tangible

personal property and taxable services within the exterior boundaries of the Yakima Indian Reservation by the Tribe and by licensed Indian retailers of the Tribe to non-members of the Tribe.

2.5 Declaratory and injunctive relief, against the state, its agents, officers and employees for entering upon trust properties within the exterior boundaries of the Yakima Reservation without the permission of the Tribe for the purpose of enforcing its tax statutes.

2.6 Declaring that so much of Rule 192 that requires the keeping of records by the Tribe and its licensed retailers on each and every sale is void.

3. **RELIEF SOUGHT BY INTERVENOR-PLAINTIFF.** The Tribe seeks the same relief sought by the United States, and to declare certain state statutes, rules and regulations void. In addition, the Tribe seeks damages against the State of Washington:

3.1 **Wrongful Regulation, Taxation and Seizure.** For allegedly wrongful and unlawful actions taken by the State and its agents and employees to regulate, levy taxes upon and encumber, seize and alienate the real and personal properties of the Tribe.

3.2 **Restriction of Commerce and Deprivation of Property.** For actions undertaken by the State and its agents and employees to levy taxes upon and restrict the trade and commerce of the Tribe, and to deprive the Tribe of its property without due process of law.

3.3 The Tribe seeks to have RCW Chapter 82.08, 82.12, 82.24, and 82.26 and WAC 458-12-192 as it affects sales by Indians on the Yakima Indian Reservation declared void.

4. **RELIEF SOUGHT BY DEFENDANT.** The State seeks declaratory relief against the United States in its representative capacity and the Tribe, declaring:

4.1 **Require Tribe to Collect.** That the State may require the Tribe and/or its licensed Indian retailers to collect and remit cigarette, tobacco products, and sales taxes imposed upon non-members of the Tribe with respect to purchases at retail from the Tribe and/or its licensed Indian retailers at locations within the exterior boundaries of the State, including the Yakima Indian Reservation.

4.2 **State Statutes Applicable.** Declaring that Washington state statutes pertaining to taxation of cigarettes (Ch. 82.24 RCW), tobacco products (Ch. 82.26 RCW), and retail sales (Ch. 82.08 RCW) and use tax (Ch. 82.12 RCW) are applicable to the Tribe and licensed retailers of the Tribe as administered by the State in conformity with WAC 458-12-192, as adopted on November 12, 1976.

5. **ADMITTED FACTS.** The parties, by counsel, stipulate and agree that the facts set forth herein are true and correct, and that the several documents attached as exhibits hereto are true, accurate and conformed copies of the originals thereof and may be received herein without further authentication. The parties further stipulate that the facts within this section are material and relevant to the Court's determination in this cause.

5.1 **United States.** The United States is a sovereign nation.

5.2 **Tribe.** The Tribe is a sovereign Indian Nation and Tribe established by treaty with the United States (12 Stat. 951) with a governing body duly recognized by the Secretary of the Interior of the United States of America.

5.3 **State.** The State is a sovereign state of the United States. Its tax laws pertaining to cigarettes, tobacco products, and sales of tangible personal property and services are administered by an agency of the State, the Department of Revenue.

5.4 **Reservation.** The Tribe has a membership of over 6,000, the majority of which live on the Yakima Indian Reservation. This reservation was reserved for the Tribe pursuant to the Treaty with the Yakimas, 12 Stat. 951, and is entirely located within the exterior boundaries of the State. The reservation has approximately 1,387,505 acres within its exterior boundaries, of which all but approximately 270,895 are held in trust or restricted status by the United States as trustee for the Tribe, its members or other Indians. These 270,895 acres are owned in fee simple primarily by non-Indians.

5.5 **Tribal Population.** The total population on the Yakima Indian Reservation is approximately 27,000. Approximately 5,000 members of the Tribe live on the reservation. Indians of other tribes and bands numbering approximately 1,500, together with members of the Yakima Tribe make up about 25 percent of the population residing on the Yakima Reservation.

5.6 **Tribal Ordinance and Tax.** The Tribe, on October 8, 1970, January 30, 1974, and on September 11, 1974, enacted tobacco ordinances, copies of which are appended hereto as Exhibits A-1-2-3. Pursuant to these ordinances, the Tribe operates a tribal enterprise, wholesaling cigarettes and tobacco products to licensed retailers of the Tribe for resale at retail to members and non-members of the tribe at locations on the Yakima Indian Reservation. The Tribe imposes a tax and obtains a return on each pack of cigarettes sold at retail by these licensed dealers. The foregoing ordinances have been approved by the Secretary of the Interior.

5.7 **Conduct of Tribal Cigarette Business and Taxation.** The tribal enterprise, licensing, and taxation scheme with respect to cigarettes and tobacco products is conducted as follows: cigarettes and tobacco products are purchased by the Tribe from out-of-state wholesalers and shipped directly to the Tribe by licensed, bonded interstate common carriers. Physical possession of

these products are taken at the tobacco warehouse of the Tribe in the Yakima Indian Nation Industrial Park, Wapato, Washington, which is within the exterior boundaries of the Yakima Indian Reservation. These products are in turn resold and delivered to the individually owned smoke shops by tribal owned vehicles. These products are then resold at retail to members and non-members of the Tribe. No records are kept with respect to the numbers of cartons of cigarettes or the value of tobacco products purchased by non-members of the Tribe, nor do the licensed retailers at any time limit sales of cigarettes to two cartons per sale to each non-member of the Tribe.

All persons licensed by the Tribe to sell cigarettes and tobacco products at retail within the exterior boundaries of the Yakima Indian Reservation are enrolled members of the Tribe. The land upon which these licensed Indian retailers conduct their retail business is allotted land held in trust by the United States for individual Indians or by restricted deed to individual Indians. The following licensed Indian tobacco product retail establishments are presently operating on the Yakima Indian Reservation:

Judy Hovis & Winona Brown
Little Brown Smoke Shack
16th Avenue
Yakima WA 98665

Harvey Lincoln Davis
Goodman Road Smoke Shop
Goodman Road
Yakima WA 98665

Kay E. Hieronimus
Triangle Smoke Shop #2
Main Street
Parker WA 98939

Arlene Watlamett Marfori
Tuffy's Smoke Shop
P. O. Box 293
Parker WA 98939

Willie Hert
Bow & Arrow Smoke Shop
Rt. 2, Box 2000
Wapato WA 98951

Robert Edward Ramsey
Little Beaver Smoke Shop
Fort Road
Toppenish WA 98948

Holt Brewer
Lower Valley Smoke Shop
Highway 3-A
Mabton WA 98935

Louise Berford Andrews
Kulchiat's Gift & Smoke Shop
West Wapato Road
Wapata WA 98951

Elmer Olney
Elmer's Trading Post
Second Street
White Swan WA 98952

Robert Ramsey
Little Beaver Smoke Shop
16th Avenue
Yakima WA 98665

Janet George
Little Smoke Shop

Dora Mesplie
Dora's Smoke Shop
Toppenish WA 98948

Elmer & Ellen Swan Olney
Reservation Smoke Shop
Highway 97
Wapato WA 98948

Gladys Herrara
Gladys' Smoke Shop
Fort Road
Toppenish WA 98948

Samuel E. Hale
Triangle Smoke Shop
Highway 22 & Larue Road
Toppenish WA 98948

William H. Hoptowit
Mabton Smoke Shop
Washington & 1st
Mabton WA 98935

Genevieve Hooper
Honey Bear Smoke Shop
Donald Street
Wapato WA 98951

5.8 **Conduct of Other Tribal Business and Taxation.** The Tribe also operates on its own behalf several other tribal enterprises. With the exception of an Aircraft Sales, Charter and Service Enterprise, which it operates as a corporation off the Yakima Indian Reservation and pays applicable state taxes regarding its operation, these tribal enterprises are all operated by the Tribe on the Yakima Indian Reservation and are wholly owned by the Tribe. The income from these enterprises is used to operate these enterprises and any surplus is used for tribal purposes. These enterprises provide on-reservation employment for tribal members and other Indians and non-Indians. The majority of those working in these tribal enterprises are tribal members. These enterprises are operated by the Tribe to develop its reservation, to provide employment for its members, and

to make a profit. In addition to the Tobacco Enterprise more fully discussed above and the Aircraft Sales and Service Enterprise mentioned in this paragraph, the Tribal enterprises are: a Land Enterprise, Timber Enterprise, Furniture Manufacturing Enterprise, Boat and Housing Unit Component Manufacturing Enterprise, Indian Arts and Crafts Sales Enterprise, Fish and Food Processing Enterprise, and a Newspaper Enterprise. The sales of these enterprises will exceed $12,000,000 annually.

At this time the State of Washington does not claim the authority to regulate or tax the present sales of the Timber or Land Enterprises regardless of whether the sales are to members or non-members. The State does claim the right and power to regulate and tax the retail sales of services and personal property of the other enterprises to non-members of the Yakima Tribe on and off the Yakima Indian Reservation. The total value of these sales, in addition to cigarette sales, will exceed $2,000,000. These sales are at economic value and if State excise taxes are paid on these sales it will reduce the income of the Yakima Tribe from these sales. No approximation of the percentage of sales to those not members of the Yakima Tribe is available, but the amount is substantial. The present state sales tax amounts to 5.1 percent of the retail sales price.

5.9 **Financing and Location of Businesses.** The tribal cigarette and tobacco products business is financed entirely by the Tribe and the retail cigarette and tobacco products businesses are financed entirely by licensed Indian retailers. Some of the retailers obtain their financing from the tribal loan program. The retailers' places of business are accessible by public roads and highways and are located in areas of the reservation open to the general public.

5.10 **Purchase by Non-Members of Tribe.** A majority of the cigarettes and tobacco products sold by the licensed Indian retailers are purchased by persons who

are not members of the Tribe. No precise figures are available to measure the exact percentage of cigarettes and tobacco products purchased by the members of the Tribe.

5.11 **Tribal Revenue From Sale of Tobacco.** The Tribe imposes a tax of 22.5 cents per carton on each carton sold by its licensed retailers. In addition, the tribe obtains revenue by a "markup" of 1 cent per carton sold to licensed Indian retailers. During 1975, the total revenue to the tribe from its tax and wholesaling enterprise was $278,408.24. The retailer realizes a gross profit of 65 cents per carton.

5.12 **Expenditure of Tribal Funds.** The funds received by the Tribe from its cigarette, tobacco products, and sales tax, plus profits from its cigarette and tobacco products wholesaling enterprise are available for expenditure by the Tribe in support of its governmental functions.

Some of the governmental programs are joint federal-tribal programs expending both federal and tribal funds. Among the governmental functions provided for the residents of the Yakima Indian Reservation by the expenditure of tribal monies including the funds available from the aforementioned tribal tax and enterprises are the following:

1. **General Council Expense.** The Yakima Tribe holds at least one annual meeting at which all adult members of the Tribe attend for the purpose of determining general policy and electing Tribal Council members. There are three officers of the General Council who attend Tribal Council Meetings and otherwise are engaged in the activities of the government of the Yakima Nation and the Yakima Indian Reservation. The amount of tribal funds expended in fiscal year 1976 was the amount of $36,525.00 for this governmental function.

2. **Tribal Council Expense.** On a day to day basis, all of the executive and legislative functions governing the Yakima Indian Nation and the Yakima

Indian Reservation are performed by a 14 member Tribal Council. This Tribal Council promulgates all laws, ordinances, and resolutions regarding the operation of the Yakima Indian Nation and the Yakima Indian Reservation and exercises supervisory and executive control over all programs of the Yakima Indian Nation. The Tribal Council is responsible for the expenditure of Tribal funds for governmental and proprietary functions in an amount that will exceed ten million dollars. During fiscal year 1976, tribal funds in the amount of $469,123.00 were expended for this governmental purpose. During fiscal year 1976 the Tribal Council supervised the expenditure of $11,992,039 for governmental and tribal programs.

3. **Tribal Health Sanitation Program.** This program provides for the maintenance of sanitation facilities upon the Yakima Indian Reservation and for construction of sanitation facilities. During fiscal year 1976, $95,000 of tribal funds was expended in maintenance and $80,890 was expended for construction of sanitation facilities to perform this governmental function.

4. **Alcoholic Program.** This program provides outreach counseling, a receiving and recovery detox center, community education and a halfway house for the assistance of alcoholics. During fiscal year 1976, the amount of tribal funds spent for this governmental purpose was $19,541.

5. **Program for Aged.** This program is to secure and maintain maximum independence and dignity in home environment to remove individual and social barriers to economic and personal independence and to provide nutritional services for older people living without the reservation. During fiscal year 1976, $40,985 of tribal funds was spent for this governmental purpose.

6. **Education and Scholarship Program.** This fund provides for gratuitous scholarship grants to assist qualified and deserving members of the Yakima Tribe in their pursuit of higher education, provide staff to run such

a program and provide student counseling and liaison services with institutions of higher education. During fiscal year 1976, $145,155 of tribal funds was spent for this governmental purpose.

7. **Johnson-O'Malley Consortium Region IV Program.** This program is to help provide familiarity with the Yakima language and the Yakima culture and to work closely with school districts in Region IV to provide such technical services as may be possible to assist the education of Indian children in the public schools. During fiscal year 1976, $8,855 of tribal funds was spent for this governmental purpose.

8. **Head Start and Kindergarten Support Projects.** This program provides a comprehensive early childhood education program with performance standards, education, social services, health, nutrition, mental health, parent involvement and cultural development for pre-school children on the Yakima Reservation. During fiscal year 1976, $162,593 of tribal funds were spent for this governmental purpose.

9. **Camp Chaparral Education Activities.** This program provides for maintenance and protection of a tribal camp in the woods where live-in educational facilities are provided under federal programs for remedial education for some 200 students during the summer months. During fiscal year 1976, $749.00 was expended for this governmental purpose.

10. **Project Palatisha-Handicapped Children.** The major purpose of this year around program is to provide special education services to pre-school children who have special needs or who are handicapped. During fiscal year 1976, $23,047 was expended on this governmental purpose.

11. **Early Childhood Education Programs.** Project SECEP provides comprehensive support services to the Yakima Indian Nation early childhood education

programs. These services include equipment, books for children, staff, parents, raw materials for staff use, making curriculum material, supplies, in service, teacher training programs, workshops and technical assistance to requesting Indians to support early childhood education programs. In fiscal year 1976, $4,447 was spent for this governmental purpose.

12. **Law Enforcement-Police Department.** For salaries and expenses to provide 22 positions: 10 tribal policemen, 1 criminal investigator, 4 dispatcher-jailers, 1 cook, 1 police matron, 1 juvenile officer and police matron, 1 custodian, 1 police clerk, 1 administrative technician, and 1 secretary to provide law enforcement officers and support personnel to provide law and order services on the Yakima Reservation. During fiscal year 1976, the amount of tribal funds expended was $285,591 for these governmental services.

13. **Tribal Game Department.** This Department has a dual responsibility of enforcement of federal and tribal game laws over the entire reservation encompassing areas of four different counties within the State of Washington and in addition, the Tribal Treaty Rights upon the Columbia River. The Department conducts all emergency search and rescue operations in the field in mountain areas of the reservation. It maintains a scuba diving team, snowmobiles, boats, all-terrain vehicles and 4-wheel drive units. During fiscal year 1976, $85,384 of tribal funds were expended for this governmental purpose.

14. **Tribal Judiciary.** Salaries, employment benefits, and equipment are needed to operate the Yakima Tribal Court consisting of the Chief Judge, three associate Judges and one Court Clerk. During fiscal year 1976, the amount of tribal funds expended for this governmental purpose was $35,958.

15. **Yakima Nation Public Defender Program.** This project provides criminal legal defense for Yakima Reservation based Native Americans. During

fiscal year 1976, $11,762 of tribal funds were spent on this governmental program.

16. **Overall Economic Development Program Feasibility Studies.** This program provides feasibility studies to determine potential for developing tribal enterprises within the Yakima Indian Reservation. During fiscal year 1976 $25,838 of tribal funds was spent for this governmental purpose.

17. **Public Relations-Media Services.** The purpose of this department is to provide public information regarding activities upon the Yakima Indian Reservation. During fiscal year 1976, $40,389 of tribal funds were expended on this governmental program.

18. **Planning Department.** The Planning Department compiles an overall comprehensive plan for the overall development of the Yakima Indian Reservation. During fiscal year 1976, $26,890 of tribal funds were spent on this governmental program.

19. **Temporary Employment Program.** To help relieve the unemployment on the Yakima Reservation, during fiscal year 1976, $29,165 of tribal funds were expended on this governmental program.

20. **Maintenance of Tribal Buildings.** Expenditure of funds to maintain, improve and operate tribal community buildings and governmental facilities for the year 1976 required the expenditure of $172,337 of tribal funds for this governmental purpose.

21. **Operation of Water and Sewer Project Within the Community of White Swan.** During fiscal year 1976, $40,191 of tribal funds were expended for this governmental purpose.

22. **Streambank Stabilization.** This program provides funds for the stabilization of the streambank on the Yakima River. During fiscal year 1976, $1,191 of tribal funds was expended for this governmental purpose.

23. **Roads Program.** To maintain and improve access roads not on the BIA or state road system and parking areas for Indian cemeteries. During fiscal year 1976, $41,500 of tribal funds were expended for this governmental purpose.

24. **Zoning Administration.** To administer tribal zoning code covering entire Yakima Indian Reservation. During fiscal year 1976, $24,956 were expended for this governmental purpose.

25. **Housing Development.** To assist in providing adequate housing on the Yakima Indian Reservation. During fiscal year 1976, $14,533 of tribal funds were expended for this governmental purpose.

In addition to the foregoing governmental services, the Yakima Nation as a government and as a proprietary function expense, expended during fiscal year 1976, the total amount of $11,996,039 for the maintenance of tribal programs.

5.13 **State Cigarette Tax.** The State cigarette excise tax amounts to $1.60 per carton of cigarettes and the State general sales tax amounts to 24 cents per carton based on the average selling price of a carton of cigarettes for a total of $5.00 per carton of cigarettes sold at retail within the state.

5.14 **Retail Price of Cigarettes.** The retail prices of cigarettes sold by licensed retailers of the Tribe are $3.95 per carton, as compared to average retail prices of $5.00 per carton in state licensed retail stores, on which the state cigarette and sales tax has been paid.

5.15 **Seizures of Unstamped Cigarettes.** Prior to the instigation of this litigation the State, under color of law, seized unstamped cigarette and tobacco products shipments which were consigned to the Tribe. These shipments originated outside of the State and were seized from common carriers while en route to the Yakima Indian Reservation and while in interstate commerce. In addition, the State has seized cigarettes and tobacco products on numerous occasions from Indian retailers of other Indian tribes and bands within the state and has threatened similar action against the licensed Indian retailers of the Yakima Tribe. In the event unstamped cigarettes and tobacco products continue to be sold by licensed Indian retailers of the Tribe to non-members of the Tribe without the affixing of tax stamps and collection of sales tax, the State will seize unstamped cigarettes and tobacco products in the possession of licensed Yakima Indian retailers intended for sale to non-members of the Tribe.

5.16 **Two Carton Exemption.** On February 19, 1972, effective February 27, 1972, the legislature enacted Laws of 1972, 1st ex. sess., chapter 157. Sections 6 and 7 of that enactment, as construed by the Washington State Supreme Court in *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974) permitted the Tribe to possess unstamped cigarettes for resale to its tribally licensed retailers, and permitted these tribally licensed retailers to retail no more than two cartons of cigarettes to non-Indians without affixing cigarette excise tax stamps and collection of the cigarette excise tax. Nothing in that statute purported to relieve licensed Yakima Indian retailers of any obligation to collect the state retail sales tax on sales of cigarettes to non-Indians, although at that time, the State, through its regulations, did not require such licensed retailers to collect and remit the state sales tax.

5.17 **Removal of Exemption and Registration.** On August 23, 1974, the State, through an emergency provision, amended its regulations pertaining to the state sales tax. The amendment removed the exemption from sales tax collection responsibility on sales to non-Indians that the licensed Indian retailers of the Tribe had been permitted under the prior state regulation on retail sales made within the exterior boundaries of the Yakima Indian Reservation. The State mailed notices to

the individual Indian retailers detailing this change and enclosing forms which were required to be completed and returned to the state within thirty (30) days. Said notices threatened that failure to comply with the registration and reporting requirements on retail sales would expose the individual licensed Indian retailers to such enforcement provisions as Washington law prescribed. No registration forms were returned to the state, nor has any licensed retailer of the Tribe collected and remitted sales tax as required pursuant to state regulation.

5.18 **Removal of Two Carton Exemption.** On May 6, 1975, the Washington State Legislature amended section 7, chapter 157, Laws of 1972, 1st ex. sess., which removed the "two carton exemption" for cigarette excise tax liability and collection responsibility. Pursuant to this statute, the Tribe acquires no cigarette excise tax liability and may possess unstamped cigarettes for resale to its tribal members. However, the statute requires licensed Indian retailers of the Tribe to collect cigarette excise taxes with respect to sales to non-members of the Tribe and remit the tax to the State.

5.19 **Rule 192.** On November 12, 1976, effective December 12, 1976, the State amended its regulations pertaining to state cigarette and sales taxes on sales by licensed Indian retailers of the Tribe to non-members of the Tribe. A copy of that regulation is attached hereto as Exhibit B. That regulation (WAC 458-12-192), among other things, requires licensed retailers of the Tribe to collect and remit state sales and cigarette taxes on sales of cigarettes to non-members of the Tribe.

5.20 **ETB 504.** On November 24, 1976, the State issued its Excise Tax Bulletin No. 504.08.192, outlining procedures to implement WAC 458-12-192 and to provide additional explanation of certain provisions of that administrative rule. A copy of ETB 504.08.192 is attached as Exhibit C. Pursuant to this ETB, licensed

retailers of the Tribe are required to register with the State (without payment of registration fee) and to keep certain records documenting the tax exempt status of sales to members of the Tribe. The following records are required to be kept by all retailers, including licensed retailers of the Tribe.

(a) Name of the Indian purchaser,

(b) The tribal affiliation of the purchaser,

(c) The Indian reservation to which or within which delivery was made, or within which retail services were rendered;

(d) The dollar amount of the sale, and

(e) The date of the sale.

5.21 **Cigarette Tax Not Within Measure of Sales Tax.** ETB 504.08.192, also explains to retailers how to compute the state sales tax on sales of cigarettes by or to Indians. As explained in the ETB, the cigarette excise tax is not to be included within the measure of the sales tax on sales of cigarettes and tobacco products by a licensed Indian retailer of the Tribe to a non-member of the Tribe.

5.22 **Computation of Different Prices.** The aggregate of taxes, both tribal and state, imposed upon the sale of cigarettes by licensed retailers of the Tribe amounts to $2.065 per carton. Assuming that current average gross profit margins remain constant, and that cigarette and sales taxes are in fact collected and remitted to the tribe and the state, the average selling price of a carton of cigarettes sold by a licensed Indian retailer of the Tribe to a non-member of the Tribe will be $5.79 per carton; the average selling price of a carton of cigarettes sold by a licensed retailer of the Tribe to a member of the Tribe will be $3.95 per carton; the average selling price of a carton of cigarettes sold by a non-Indian retailer to a member of the Tribe will be $4.76 per carton; and the average selling price of a carton of cigarettes sold by a non-Indian retailer to a non-member of the Tribe will be

$5.00 per carton. These differences in price are due almost entirely to differences in tax liability.

5.23 **Stamp Requirement.** Licensed Indian retailers of the Tribe may possess unstamped cigarettes for purposes of resale to members of the Tribe. However, state law purports to provide at the time of sale of cigarettes and tobacco products to a non-member of the Tribe, the licensed retailers must affix state cigarette tax stamps on each package of cigarettes and collect and remit to the State the cigarette and tobacco products excise taxes imposed on the purchaser. State law purports to provide the licensed retailers of the Tribe may fulfill this stamping responsibility either by (1) purchasing pre-stamped cigarettes and tobacco products from a wholesaler licensed by the State to affix Washington tax stamps; or (2) purchasing a supply of stamps from the State, in which case the purchase price may be deferred for a period of 30 days upon the posting of a bond in the amount of the purchase price or $2,500 whichever is greater. In the event the licensed Indian retailer affixes stamps himself, he will be entitled to compensation at the rate of $1.85 per thousand packs of cigarettes.

5.24 **Refusal of Tribe.** The Tribe and the licensed retailers of the Tribe have never sought the authorization of the State to acquire and possess unstamped cigarettes and tobacco products and they have never requested to be licensed by the State for purposes of sales of cigarettes and tobacco products. The licensed Indian retailers of the Tribe have failed and will continue to fail and refuse to affix stamps, or otherwise collect and remit any state cigarette and tobacco products excise taxes and sales taxes on sales to non-members of the Tribe purchasing at retail from such licensed Indian retailers. The Tribe and its members who make retail sales of property and services to non-members of the Tribe within the exterior boundaries of the Yakima Indian Reservation have also failed and will continue to fail or refuse to collect and remit state sales taxes on sales to non-members of the Tribe.

5.25 **Temporary Restraining Order.** As a result of seizures of unstamped cigarettes bound for the Yakima Indian Reservation, the Tribe ceased its tribal wholesaling enterprise in January 1973, for a period of ten months, until the issuance of a temporary restraining order in this cause on November 5, 1973, restraining the State from interfering in the conduct of the tribal cigarette enterprise. Losses to the Tribe, in terms of lost profits and lost tax revenues during this period of time amounted to $150,000, computed as follows:

During 1972, according to figures of the State, the tribal enterprise sold to its licensed retail dealers the following cartons of cigarettes and collected its tax and overhead on said sales:

1-72: 84,498. 2-72: 115,306. 3-72: 115,579. 4-72: 105,334. 5-72: 169,908. 6-72: 148,276. 7-72: 120,556. 8-72: 160,489. 9-72: 140,545. 10-72: 154,053. 11-72: 118,028. 12-72: 87,712.

There is no reason to believe that sales in like amounts would not have continued through 1973. Subtracting handling costs, this would bring a tribal loss from the sales of all these cigarettes to approximately $15,000 per month for a ten-month period.

5.26 **No Tax on Tribe.** The civil action sought in the original complaint of the United States was dealt with in *Tonasket v. State*, and until that decision is changed or the statutes on which it is predicated are changed in this particular, the State asserts no liability against the Tribe for cigarette taxes imposed by Ch. 82.24 RCW.

5.27 **No Tax on Tribal Members.** The State does not contest the right of the Tribe or its licensed retailers to make sales of cigarettes, tobacco products, tangible personal property and services at retail to members of the Tribe within the exterior boundaries of the Yakima Indian Reservation for said members own use and consumption without payment of state excise taxes.

6. **FACTS NOT NECESSARILY MATERIAL.** The parties, by counsel, stipulate and agree that the following facts are true and correct and may be considered by the Court as established facts without necessity for further proof, dependent only upon the Court's determination as to materiality or relevancy of these facts in making its determination in this cause. The parties do not, however, waive any objections with respect to such materiality or relevancy.

6.1 **Federal Tax.** The Federal cigarette tax has been paid on all cigarettes purchased by the Tribe and sold at retail by its licensed retailers.

6.2 **BIA.** The Superintendent of the Yakima Indian Agency of the BIA has been delegated the responsibility to license traders with Indians within the exterior boundaries of the Yakima Indian Reservation under the Indian Traders Act (25 U.S.C. §§261-264) and regulations thereunder adopted by the BIA (25 CFR §251, *et seq.*).

6.3 **No Licensed Traders.** No persons trading with the Indians on the Yakima Indian Reservation are licensed under the Indian Traders Act.

6.4 **Voluntary Payment of Certain State Taxes.** A substantial majority of the employees of the Tribe are purportedly under the jurisdiction of the State for unemployment and workman's compensation purposes and the Tribe voluntarily pays the employer's taxes and withholds and pays the employee's taxes imposed by Washington law.

7. **CONTENTIONS OF PLAINTIFF UNITED STATES.**

7.1 This case is within the jurisdiction of a three-judge Court under 28 U.S.C.A. §2281 because of the challenge to the state taxing statutes under the commerce clause of the Constitution.

7.2 The commerce clause of the Constitution of

the United States grants to Congress the exclusive power to regulate commerce with Indians.

7.3 The states, therefore, may regulate Indian commerce only with the express authority of Congress.

7.4 State taxation of retail sales of cigarettes and personal property by Indians on their reservation constitutes a regulation of commerce.

7.5 Congress has not granted to the states power to tax or regulate Indian commerce on their reservations.

7.6 Congress has authorized the Secretary of the Interior to regulate commerce by Indians to approve regulation and taxation of business by Indian tribal governments on their reservations.

7.7 The Secretary of the Interior has approved tribal ordinances of the Yakima Indian Nation regulating and taxing retail sales of cigarettes and other personal property by the Tribe and tribal members to both Indians and non-Indians on their reservation.

7.8 Such approval by the Secretary of Interior constitutes a preemption by the federal government of the regulation and taxing of cigarettes and retail sales on the Yakima Indian Reservation.

7.9 The revenues from the taxing ordinances of the Yakima Indian Nation on cigarettes and retail sales is a significant and important source of income for the conduct of tribal government programs.

7.10 The attempt by the State of Washington to tax cigarette sales by the Tribe or Indian retailers to other Indians or non-Indians competes, conflicts and interferes with regulation of Indian commerce on the Yakima Indian Reservation in an area already preempted by the United States in violation of the commerce clause and the supremacy clause of the Constitution.

7.11 Such conflict with federal action exists whether taxes are levied directly upon the Tribe or Indian retailers or by means of requiring them to collect taxes

from non-Indians and remit them to the State.

7.12 The seizure of unstamped cigarettes being transported to the Yakima Indian Reservation in commerce by the State of Washington to enforce collection of cigarette taxes on sales by licensed Indian retailers to non-Indians is a violation of the commerce clause and the supremacy clause of the Constitution.

7.13 Even were the court to find that the State of Washington has the power to impose upon the tribe and tribal retailers the obligation to collect and remit cigarette and sales taxes on sales to non-Indians the State could nevertheless not impose such obligation with respect to sales to any Indians including Indians who are not members of the Yakima Indian Nation on the reservation.

8. CONTENTIONS OF INTERVENOR-PLAINTIFF YAKIMA INDIAN NATION.

8.1 In interpreting treaties and laws involving the Tribe and its members, said treaties and laws are to be resolved in favor of the Tribe and its members.

8.2 The State of Washington's tax laws, rules and regulations, in as much as they deal with Indian Commerce within the Yakima Reservation, are totally within the sphere, which under the Treaty with the Yakimas, relevant statutes and Tribal Resolutions, is reserved for the Federal Government, the Tribe and its members.

8.3 Absent governing Acts of Congress, the State of Washington does not have the power to infringe on the right of the Tribe and its members to make their own laws and to be ruled by them.

8.4 Absent governing Acts of Congress, the Tribe has exclusive sovereignty, under general federal supervision, which precludes the extension of state law (including state tax law and regulations) to Indians on the Yakima Reservation.

8.5 It is federal policy to strengthen tribal self-government and the State of Washington's rules,

regulations, and laws providing that the Tribe and its licensed member retailers be registered, regulated and collect taxes on any portion of its or their sales, is contrary to said federal policy and is an interference with tribal self-government.

8.6 The Washington Enabling Act and Constitution expressly disclaims state jurisdiction or state taxing authority on the Yakima Indian Reservation and the extension of Washington State tax laws or regulations to Indian commerce on the Yakima Reservation without repeal of the disclaimer provision in the State Constitution or permission of the United States would not provide constitutional due process of law to the Tribe and its members and is forbidden by Federal law. That Chapters 82.08, 82.12, 82.24, 82.26 and WAC 458-12-192 exceed constitutional or statutory authority.

8.7 Absent governing Acts of Congress, plaintiff Tribe has retained the sovereign right and power to determine whether to tax or not tax all sales by all retailers to all purchasers within the exterior boundaries of the Yakima Indian Reservation.

8.8 Plaintiff Tribe in the exercise of its sovereign power, absent any governing Acts of Congress, in licensing and regulating member retailers and taxing sales of cigarettes by its licensed retailers to members, Indians, and non-Indians, has preempted within the Yakima Indian Reservation any licensing, registration, regulation of said retailers or taxation of any sales by said licensed retailers.

8.9 Plaintiff Tribe, in the exercise of its right of self-determination and self-government, has the sovereign right to be free of any state law requiring the licensing, registration, regulation of any tribal enterprise located within the Yakima Reservation and to be free from tax on any sales made by the Trade within said Yakima Indian Reservation.

8.10 Plaintiff Tribe's sovereign right to run its own enterprises without interference and to regulate its

member retailers and to tax all sales of these retailers for governmental purposes, within the Yakima Indian Reservation, absent governing Acts of Congress, must prevail over any duty non-member purchasers may have to pay any excise or sales tax to the State of Washington.

8.11 The rules, regulations and laws of the State of Washington that requires the Tribe and all tribally licensed retailers to be registered, make determination and inquiry as to the tribal membership of all purchasers and to record and report information regarding sales, is an unlawful and improper burden on Indian Commerce and is a burden that frustrates tribal self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.12 The taxation by the State of Washington of sales by the Tribe to non-members within the Yakima Indian Reservation and the taxation of sales by licensed tribal retailers on the Yakima Indian Reservation to non-members is an unlawful and improper burden on Indian Commerce and is a burden that frustrates both Indian self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.13 The rules, regulations and laws of the State of Washington that limit the purchase of unstamped cigarettes to intrastate purchasers, and requires the tribally-licensed retailer or the Tribe as a seller in Indian Commerce, to determine (at his or its jeopardy) the future use to be made of the cigarettes after sale on the Yakima Indian Reservation is an unlawful and improper burden on Indian Commerce, fails to provide constitutional standards of definiteness, is a burden that frustrates both tribal self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.14 The State of Washington's regulations and laws that would place a duty to collect taxes from non-members of the Yakima Tribe and its members where no jurisdiction to enforce this duty exists or where procedure is not clearly delineated by the State, is an

improper and unlawful infringement on the rights of self-government and Indian Commerce and in addition establishes laws and regulations that are so indefinite that they fail to meet constitutional standards of definiteness.

8.15 Under State of Washington law, the first incidence of imposition of the state cigarette tax falls on the seller and not on the non-member purchaser. Alternatively even if such sale to a non-Indian purchaser is proper, controlling law places the burden of the tax on the Indian which is clearly an improper interference with Indian Commerce and self-government.

8.16 Taxation of a sale of cigarettes by a member retailer to non-member Indians and non-Indians by both the Tribe and the State would be improper and unconstitutional double taxation and the sovereign right of the Tribe to tax said sales within the Yakima Indian Reservation must prevail.

8.17 The collection of State of Washington cigarette taxes and sales taxes on the sale of cigarettes to other than "qualified purchasers" as defined by state law and regulation, or members of the Yakima Tribe would under economic circumstances substantially reduce tribal income and tribal taxes and likewise would substantially reduce the income of tribally-licensed retailers and therefore is an unlawful and improper burden on Indian Commerce and is a burden that frustrates both tribal self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.18 The State of Washington has refused to consider any agreement of comity between the Tribe and State that would permit a taxation scheme to further tribal self-government and has by its actions in passing and promulgating its tax rules, regulations and laws sought to destroy the tribal tax and income base. This action if allowed will hamper or destroy effective tribal self-government.

8.19 The State of Washington in its attempt to collect taxes from non-members on sales by the Tribe and

its members to non-members within the Yakima Indian Reservation has limited its collection to actions against the Tribe and its members. Such action is discriminatory and an improper interference with tribal self-government and violates the due process and equal protection rights of the Yakima Indian Nation and its members.

8.20 The collection of State of Washington sales taxes on sales made by the Tribe to non-members within the Yakima Reservation under economic circumstances would reduce tribal income used for tribal purposes and is an unlawful and improper burden on tribal self-government and Indian Commerce.

8.21 That Chapters 82.24 RCW, 82.26 RCW, 82.08 RCW and 82.12 RCW and the promulgation and operation of Rule 192 (WAC 458-12-192) and procedures to implement said rule (Excise Tax Bulletin No. 504.08.192) are inapplicable to the Tribe and its licensed retailers and/or are unconstitutional and unlawful.

8.22 That the plaintiff Tribe has no effective remedy at law and the plaintiff Tribe and its members are entitled to declaratory and injunctive relief against the operation of Rule 192.

8.23 That the plaintiff Tribe is entitled to damages against the State of Washington in the amount of $150,000 for interference with its right to transact business and operation of its governmental powers.

8.24 The amount of cigarette taxes and sales taxes on the sale of cigarettes is confiscatory.

8.25 The State does not adequately compensate retail sellers for the cost of affixing cigarette tax stamps, keeping records or collecting excise taxes.

8.26 The Yakima Indian Nation is a sovereign Indian Nation and absent acts of Congress defendant may not ask relief against plaintiff Tribe.

8.27 Plaintiff should be awarded their costs and reasonable attorney's fees in this action.

9. CONTENTIONS OF DEFENDANT STATE OF WASHINGTON.

9.1 The State of Washington may require the Tribe and its tribally-licensed Indian retailers to collect and remit state excise taxes imposed on non-members of the Tribe making purchases of goods and services at retail within the exterior boundaries of the Yakima Indian Reservation.

9.2 Washington state sales tax (RCW Ch. 82.08), cigarette tax (RCW Ch. 82.24) and tobacco products tax (RCW Ch. 82.26) are imposed upon non-members of the Yakima Indian Nation making purchases of goods and services at retail within the exterior boundaries of the Tribe's reservation.

9.3 Washington may adopt and enforce reasonable rules and regulations to enforce state excise tax collection responsibility on retail sales of cigarettes, tobacco products, and goods and services by the Tribe and its tribally-licensed retailers to non-members of the Tribe. The rules and regulations contained in WAC 458-12-192 and E.T.B. 504.08.192 are reasonable and may be enforced against the Tribe and its tribally-licensed retailers.

9.4 A tribal tax imposed on tribally-licensed Indian retailers with respect to sales of cigarettes to non-members of the tribe does not preempt a state excise tax imposed upon non-members of the Tribe with respect to the same transaction.

9.5 Washington may classify as "contraband" unstamped cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the Tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiff-intervenor's Indian reservation or are in transit in interstate commerce to plaintiff-intervenor's Indian reservation from points outside the state.

9.6 Plaintiff-intervenor's damages resulting from the seizure and sale of unstamped cigarettes by the

state should be limited to the wholesale value of cigarettes, plus applicable tribal tax, reasonably intended for resale to members of plaintiff-intervenor's tribe for ultimate consumption. In the absence of records detailing actual sales to members of the Tribe, the amount of such cigarettes reasonably intended for resale for ultimate consumption should be determined by reference to tribal membership and average United States per capita consumption of cigarettes in the year in which the cigarettes were seized.

9.7 A reasonable estimate of the amount of state tax loss on sales of cigarettes by plaintiff-intervenor's tribal licensees during the period 1972 through 1976 is as follows:

1972	$ 2,711,825.00
1973	404,972.00
1974	2,620,587.00
1975	2,336,094.00
1976	2,145,528.00
TOTAL	$10,219,007.00

10. ISSUES OF LAW

10.1 Does this three-judge panel have jurisdiction over this cause under 28 U.S.C.A. §2281?

10.2 May the State of Washington impose upon the Yakima Indian Nation and/or licensed Indian retailers the obligation to collect cigarette and sales taxes on sales of cigarettes and other personal property on the reservation to non-members of the Tribe and remit them to the State where the Tribe has adopted ordinances taxing those same transactions?

10.3 May the State of Washington impose upon the Yakima Indian Nation and/or licensed Indian retailers the obligation to collect taxes on the sale of cigarettes and other personal property on the reservation to Indians other than members of the Yakima Indian Nation and remit such taxes to the State where the Tribe has adopted ordinances taxing these same transactions?

10.4 May the State of Washington impose upon the Yakima Indian Nation and/or its licensed Indian retailers the obligation to register with the State, ascertain the membership and non-membership of its purchasers, affix tax stamps and report said information to the State of Washington on sales of cigarettes and other personal property on the reservation to non-members of the Tribe?

10.5 Assuming the State has the authority to require the Yakima Indian Nation and/or its licensed Indian retailers to collect and remit taxes on such sales, may the State enforce collection of such taxes by confiscating as contraband cigarettes or other personal property within the State which is being shipped in commerce to the Yakima Indian Nation for resale to non-members of the Tribe?

10.6 Assuming the State has the authority to require the Yakima Indian Nation and/or its licensed Indian retailers to collect and remit taxes on such sales, may the State enforce collection of such taxes by confiscating as contraband cigarettes or other personal property being held by the Tribe or its retailers within the exterior boundaries of the Yakima Indian Reservation or lawfully levy and seize upon property of the Yakima Indian Nation to collect for taxes assessed against said Yakima Indian Nation.

10.7 In view of the immunity from suit of the Yakima Indian Nation, may the State of Washington attempt to seek relief against the Yakima Indian Nation without its consent?

11. EXHIBITS

The following exhibits were produced and may be received in evidence if otherwise admissible, without further authentication, it being admitted that each is what it purports to be:

PLAINTIFF'S EXHIBITS

11.1 Bureau of Indian Affairs, Office of Reservation Programs "Social Economic Report on Yakima

Indians of the Yakima Indian Reservation," September 1975.

11.2 Treaty between the United States and Yakima Nation of Indians (12 Stat. 951) dated June 9, 1855. Ratified March 8, 1859.

11.3 A true copy of the record of official proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Governor and Superintendent, Washington Territory, and Joel Palmer, Superintendent Indian Affairs, Oregon Territory, on the part of the United States with the Tribes of Indians named in the Treaties, made at that Council, June 9 and 11, 1855.

11.4 Yakima General Council Resolution T-38-56.

DEFENDANT'S EXHIBITS

11.5 WAC 458-12-192

11.6 E.T.B. 504.08.192

12. ACTIONS OF THE COURT

12.1 On November 5, 1973, this Court issued a Temporary Restraining Order restraining the State and its agents and employees from engaging in any action or acting in any manner to assess a tobacco tax upon tobacco products being shipped from outside the State of Washington to the Yakima Indian Nation for delivery upon trust land, from engaging in any action or acting in any manner which interferes with such tobacco products while in commerce bound for delivery to the Yakima Indian Reservation and from engaging in any action or acting in any manner which attempts to levy upon the properties of the Yakima Indian Nation to collect tobacco taxes assessed against the Yakima Indian Nation.

12.2 On September 6, 1974, this Court issued a Preliminary Injunction enjoining the State and its agents and employees from engaging in any action or acting in any manner to assess a tobacco tax upon tobacco products being shipped from outside the State of Washington to the

Yakima Indian Nation for delivery upon trust land, from engaging in any action or acting in any manner which interferes with such tobacco products while in commerce bound for delivery to the Yakima Indian Reservation and from engaging in any action or acting in any manner which attempts to levy upon the properties of the Yakima Indian Nation to collect tobacco taxes assessed against the Yakima Indian Nation.

IT IS HEREBY ORDERED That the foregoing constitutes the Pre-Trial Order in the above entitled cause and that upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended, except by consent of the parties, or by order of the Court to prevent manifest injustice.

DATED this _____ day of _____, 1977.

_____
UNITED STATES DISTRICT COURT

The foregoing Pre-Trial Order is hereby approved.

/s/ _____ 2/4/77
Dean C. Smith — Date
Attorneys for Plaintiff

/s/ _____ 2/3/77
James B. Hovis — Date
Attorney for Plaintiff-Intervenors

/s/ _____ February 2, 1977
Richard H. Holmquist — Date
Attorney for Defendant

/s/ _____ February 2, 1977
Matthew J. Coyle — Date
Attorney for Defendant

The foregoing Supplemental Pre-Trial Order is approved as of this 22nd day of February 1977.

/s/ _____
John F. Kilkenny
United States Senior Circuit Judge

/s/ _____
William G. East
United States Senior District Judge

/s/ _____
Howard B. Turrentine
United States District Judge

ADDENDUM

The following was inadvertently not typed in the foregoing Order, but is attached hereto and made a part hereof.

13. ISSUES OF FACT

13.1 What would be the economic effect on the plaintiff, its tribal tobacco enterprises, and the tribally-licensed cigarette retailers of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

13.2 What would be the economic effect on the tribal taxing schemes and tribal self-government of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

13.3 What would be the economic effect on commerce between Indians and non-Indians on the Reservation of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

13.4 What would be the economic effect on the plaintiff tribe and its tribal enterprises of the imposition of the state sales tax on Tribal Enterprises on-reservation sales to non-members?

13.5 What would be the economic effect of the requirement that the tribe and its tribally licensed

retailers register, determine ultimate use of sales to members, keep records of sales to members, and report these records to the State of Washington.

13.6 What damages have the plaintiff Tribes suffered as a result of the seizures and threatened seizures by the State of Washington from January 1973 through November 1973?

[EXHIBIT A-1]

RESOLUTION T-20-71

WHEREAS, the sale, handling or distribution of cigarettes on trust or restricted property within the exterior boundaries of the Yakima Indian Reservation by Indians is exempt from taxation by the State of Washington; and

WHEREAS, this exemption arises under the Treaty between the U.S. Government and the Yakima Indian Nation; and

WHEREAS, the Yakima Nation has the sovereign power to regulate business and tax the same within the exterior boundaries of the reservation under said Treaty; and

WHEREAS, the present trade of cigarettes has been handled in such a manner as to show a need for regulating for the protection of Tribal treaty rights.

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in regular session on this 8th day of October, 1970, a quorum being present, that:

SECTION 1. The provisions of this resolution shall be deemed an exercise of the power and authority delegated to the Yakima Tribal Council by the Yakima General Council (T-38-56) to regulate business within the exterior boundaries of the Yakima Indian Reservation, and require a Tribal Permit to conduct such business.

SECTION 2. On and after the effective date of this resolution, no person shall engage in the sale, or distribution of cigarettes or other tobacco products on trust or restricted lands within the exterior boundaries of the Yakima Indian Reservation without first having obtained and being a holder of a valid and sustaining Tribal Permit, visibly displayed in the place of business, to do so issued under the provisions of this resolution and without the Tribal permit imposed by this resolution.

SECTION 3. Any person who shall violate any of the provisions of this resolution shall be deemed guilty of a violation of the laws of the Yakima Indian Nation and shall be subject to imprisonment in the Tribal Jail for not more than ninety (90) days and by a fine [*sic*] of not more than One Hundred Eighty Dollars ($180.00) and or both such confinement and fine.

SECTION 4. The application for a Tribal Permit under this resolution shall be made to the Yakima Tribal Council and shall contain the following information:

(a) Name, age, date of birth, Yakima enrollment number, degree of Yakima blood and Tribal affiliation.
(b) Residence of applicant now and for the past five (5) years.
(c) The place of business and the allotment number.
(d) Provide a financial statement.
(e) Applicant's employment for the past five (5) years.
(f) Whether applicant owns trust or restricted lands within the Yakima Indian Reservation.

SECTION 5. A permit fee to sell or distribute cigarettes under this resolution shall be Twenty Five Dollars ($25.00) initially for said business license and a monthly permit fee of One Cent (1¢) per package of smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and monthly permit fee shall be paid by the fifth (5th) of the first month following the month in which a permit is granted and by the fifth (5th) of each and every month thereafter. Payment of

the monthly permit fee shall be made by cash, cashier's check or money order to the credit of the Yakima Nation at the Cashier window of the Yakima Indian Agency and the permittee shall likewise mail at time of payment a notarized statement specifying number of packages sold in previous month, where purchased and name and location of place of business to Yakima Tribal Council, P.O. Box 632, Toppenish, Washington. Should permittee fail to make said payment or file statement by said date or should the Tribal Council find that the statement of sales is in error, the permit to sell cigarettes issued under this resolution shall be cancelled forthwith.

SECTION 6. In determining whether a permit shall issue the Yakima Tribal Council shall take into consideration ownership of the property, location of place of business, financial stability and experience of applicant. The applicant shall be both owner and operator of the business. The Yakima Tribal Council shall limit the number of Tribal Permits and location that will adequately service the area and their determination as to whether or not a Tribal Permit shall issue is final.

SECTION 7. A Tribal Permit to sell or distribute cigarettes or other tobacco products shall be applied for yearly on or before the 30th of June giving at that time a notarized statement of cartons and other tobacco products sold during the previous year and gross income derived therefrom, and further, provide the names of all employees and amount of income earned by each.

SECTION 8. The Yakima Tribal Council shall have the right and authority to examine the books at any reasonable time to verify the sales and salaries paid to employees.

SECTION 9. That owners organize and establish an equal price for their merchandise and an equal wage for all their employees in accordance with the employees ability to operate the business for the owner.

SECTION 10. That no benefits be derived by non-Yakimas from the sale of cigarettes, tobacco products, or other merchandise.

SECTION 11. Sales of cigarettes to the United States or to any department thereof which is directly operated and controlled by the government generally and sales of cigarettes upon which Tax Stamps issued by the State of Washington in the lawful amount have been affixed are not covered by the terms of this resolution.

DONE AND DATED on this 8th day of October, 1970 at the Yakima Indian Agency, Toppenish, Washington, by the Yakima Tribal Council by a vote of 10 for and none against.

/s/_____
Robert B. Jim, Chairman
Yakima Tribal Council

ATTEST:

/s/_____
Genevieve Hooper, Secretary
Yakima Tribal Council

[EXHIBIT A-2]

RESOLUTION T-57-74

WHEREAS, the sale, handling or distribution of cigarettes on trust or restricted property within the exterior boundaries of the Yakima Indian Reservation by Indians is exempt from taxation by the State of Washington; and

WHEREAS, this exemption arises under the Treaty of 1855 between the U.S. Government and the Yakima Indian Nation; and

WHEREAS, the Yakima Nation has the sovereign power to regulate business and tax the same within the exterior boundaries of the reservation under said Treaty; and

WHEREAS, the trade of cigarettes has been handled in such a manner as to show a need for regulating for the protection of Tribal Treaty rights; and

WHEREAS, litigation costs and need for funds in other Tribal programs necessitates an increase in tax and experience under T-20-71 shows the need for other amendments.

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in regular session on this 31st day of January, 1974, A quorum being present, that:

SECTION 1. The provisions of this resolution shall be deemed an exercise of the power and authority delegated to the Yakima Tribal Council by the Yakima General Council (T-38-56) to regulate business within the exterior boundaries of the Yakima Indian Reservation, and require a Tribal permit to conduct such business.

SECTION 2. On and after the effective date of this resolution, no person shall engage in the sale or distribution of cigarettes or other tobacco products on trust or restricted lands within the exterior boundaries of the Yakima Indian Reservation without first having obtained and being a holder of a valid and sustaining Tribal permit, visibly displayed in the place of business.

SECTION 3. The application for a Tribal permit under this resolution shall be made to the Yakima Tribal Council and shall contain the following information:

(a) Name, age, date of birth, Yakima Enrollment number, degree of Yakima blood and Tribal affiliation.
(b) Residence of applicant now and for the past five (5) years.
(c) The place of business and allotment number.
(d) Provide a financial statement and/or credit reference.
(e) Applicant's employment record for the past five (5) years.
(f) Whether applicant owns trust or restricted lands within the Yakima Indian Reservation.

SECTION 4. A Tribal permit to sell or distribute cigarettes under this resolution shall be Twenty-five dollars ($25.00) annually and a permit fee of five

cents (5¢) per package of the smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and other permit fees shall be paid at the time of each and every delivery of cigarettes.

SECTION 5. In determining whether a permit shall issue the Yakima Tribal Council shall take into consideration ownership of the property, location of place of business, financial stability and experience of applicant. The applicant shall be both owner and operator of the business. The Yakima Tribal Council shall limit the number of Tribal permits and location that will adequately service the area and their determination as to whether or not a Tribal permit shall issue is final.

SECTION 6. A Tribal Permit to sell or distribute cigarettes or other tobacco products shall be applied for yearly on or before the 30th of June giving at that time a notarized statement of cartons and other tobacco products sold during the previous year and gross income derived therefrom, and further, provide the names of all employees and amount of income earned by each.

SECTION 7. The Yakima Tribal Council shall have the right and authority to examine the books at any reasonable time to verify the sales and salaries paid to employees.

SECTION 8. That owners organize and establish an equal price for their merchandise and an equal wage for all their employees in accordance with the employees ability to operate the business for the owner. All employees shall be enrolled members of the Yakima Indian Nation.

SECTION 9. That no direct benefits be derived by non-Yakimas from the sale of cigarettes, tobacco products, or other merchandise.

SECTION 10. Sales of cigarettes to the United States or to any department thereof which is directly operated and controlled by the government and sales of cigarettes upon which Tax Stamps issued by the State of Washington in the lawful amount have been affixed are not covered by the terms of this resolution.

SECTION 11. Licensees shall purchase all tobacco products sold on licensed premises from or through the Yakima Indian Nation.

SECTION 12. Any person who shall violate any of the provisions of this resolution shall be deemed guilty of a violation of the laws of the Yakima Indian Nation and shall be subject to imprisonment in the Tribal Jail for not more than ninety (90) days and by a fine [*sic*] of not more than One Hundred Eighty Dollars ($180.00) and/or both such confinement and fine.

SECTION 13. Any permittee who shall fail to comply with the terms of this ordinance in any particular shall have his permit cancelled or suspended. Written notification of the grounds for said cancellation shall be given at least five (5) days prior to a hearing held before the Law and Order Committee to determine if the ordinance has been violated. Cancellation or suspension by said committee may be appealed to the Yakima Tribal Council.

SECTION 14. This resolution shall be effective upon its passage and approval and T-20-71 is hereby repealed.

DONE AND DATED on this 31st day of January, 1974 at the Yakima Indian Agency, Toppenish, Washington, by the Yakima Tribal Council by a vote of 10 for and none against (1 not voting).

/s/_____
Watson Totus, Chairman
Yakima Tribal Council

ATTEST:

/s/_____
Joe Sampson, Secretary,
Yakima Tribal Council

[EXHIBIT A-3]

RESOLUTION T-22-75

WHEREAS, the sale, handling or distribution of cigarettes on trust or restricted property within the exterior boundaries of the Yakima Indian Reservation by Indians is exempt from taxation by the State of Washington; and

WHEREAS, this exemption arises under the Treaty of 1855 between the U.S. Government and the Yakima Indian Nation; and

WHEREAS, the Yakima Nation has the sovereign power to regulate business and tax the same within the exterior boundaries of the reservation under said Treaty; and

WHEREAS, the trade of cigarettes has been handled in such a manner as to show a need for regulating for the protection of Tribal treaty rights; and

WHEREAS, litigation costs and need for funds in other Tribal programs necessitates an increase in tax and experience under resolution T-57-74 shows the need for other amendments.

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in regular session on this 10th day of September, 1974 at the Yakima Indian Agency, Toppenish, Washington, a quorum being present, that:

SECTION 1. The provisions of this resolution shall be deemed an exercise of the power and authority delegated to the Yakima Tribal Council by the Yakima General Council (T-38-56) to regulate business within the exterior boundaries of the Yakima Indian Reservation and require a Tribal permit to conduct such business.

SECTION 2. On and after the effective date of this resolution, no person shall engage in the sale or distribution of cigarettes or other tobacco products on trust or restricted lands within the exterior boundaries of the Yakima Indian Reservation without first having obtained and being a holder of a valid and sustaining Tribal permit, visibly displayed in the place of business.

SECTION 3. The application for a Tribal permit under this resolution shall be made to the Yakima Tribal Council and shall contain the following information:

(a) Name, age, date of birth, Yakima enrollment number, degree of Yakima blood and Tribal affiliation.
(b) Residence of applicant now and for the past five (5) years.
(c) The place of business and allotment number.
(d) Provide a financial statement and/or credit reference.
(e) Applicant's employment record for the past five (5) years.
(f) Whether applicant owns trust or restricted lands within the Yakima Indian Reservation.

SECTION 4. A Tribal permit to sell or distribute cigarettes under this resolution shall be Twenty-Five Dollars ($25.00) annually and a permit fee of Two and one-quarter cents (2¼¢) per package of smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and other permit fees shall be paid at the time of each and every delivery of cigarettes.

SECTION 5. In determining whether a permit shall issue the Yakima Tribal Council shall take into consideration ownership of the property, location of place of business, financial stability and experience of applicant. The applicant shall be both owner and operator of the business. The Yakima Tribal Council shall limit the number of Tribal permits and location that will adequately service the area and their determination as to whether or not a Tribal permit shall issue is final.

SECTION 6. A Tribal permit to sell or distribute cigarettes or other tobacco products shall be applied for yearly on or before the 30th of June giving at that time a notarized statement of cartons and other tobacco products sold during the previous year and

gross income derived therefrom, and further, provide the names of all employees and amount of income earned by each.

SECTION 7. The Yakima Tribal Council shall have the right and authority to examine the books at any reasonable time to verify the sales and salaries paid to employees.

SECTION 8. The owners organize and establish an equal price for their merchandise and an equal wage for all their employees in accordance with the employees ability to operate the business for the owner. All employees shall be enrolled members of the Yakima Indian Nation.

SECTION 9. That no direct benefits be derived by non-Yakimas from the sale of cigarettes, tobacco products, or other merchandise.

SECTION 10. Sales of cigarettes to the United States or to any department thereof which is directly operated and controlled by the government and sales of cigarettes upon which tax stamps issued by the State of Washington in the lawful amount have been affixed are not covered by the terms of this resolution.

SECTION 11. Licensees shall purchase all tobacco products sold on licensed premises from or through the Yakima Indian Nation.

SECTION 12. Pursuant to Section 41, Chapter 5 of the Law and Order Code, any person who shall violate any of the provisions of this resolution shall be deemed guilty of a violation of the laws of the Yakima Indian Nation and shall be subject to imprisonment in the Tribal Jail for not more than ninety (90) days and by a fine [*sic*] of not more than One Hundred Eighty Dollars ($180.00) and/or both such confinement and fine.

SECTION 13. Any permittee who shall fail to comply with the terms of this ordinance in any particular shall have his permit cancelled or suspended. Written notification of the grounds for said cancellation shall be given at least five (5) days prior to a hearing held before the Law and Order Committee to determine if the ordinance has been violated. Cancellation or

suspension by said Committee may be appealed to the Yakima Tribal Council.

SECTION 14. This resolution shall be effective upon its passage and approval and T-57-74 is hereby repealed.

DONE AND DATED on this 10th day of September, 1974 at the Yakima Indian Agency, Toppenish, Washington, by the Yakima Tribal Council by a vote of 10 for and none against.

/s/_____
Watson Totus, Chairman,
Yakima Tribal Council

ATTEST:

/s/_____
Joe Sampson, Secretary,
Yakima Tribal Council

[EXHIBIT B]

STATE OF WASHINGTON DEPARTMENT OF REVENUE
OLYMPIA, WASHINGTON

WAC 458-20-192 (Rule 192) INDIANS, INDIAN RESERVATIONS

DEFINITIONS

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order which areas are currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispel, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

NOTE: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the State of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

BUSINESS AND OCCUPATION TAX

Indians and Indian tribes are not taxable with respect to business conducted by them wholly within an Indian reservation.

No deduction is allowed to others by reason of business conducted with Indians or Indian tribes within an Indian reservation.

RETAIL SALES TAX

Indians and Indian tribes are not subject to the sales tax upon sales to them of tangible personal property or otherwise taxable services which are made wholly within an Indian reservation.

Sales of tangible personal property to Indians or Indian tribes by off-reservation persons are subject to the retail sales tax except where the seller makes actual delivery of the property sold to a point within an Indian reservation.

Sales of taxable services to Indians or Indian tribes are subject to the retail sales tax except where the services are rendered entirely within an Indian reservation.

Sales to persons other than Indians are subject to the retail sales tax irrespective of where delivery or rendition of services takes place. Thus, Indian and Indian tribal retailers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them within an Indian reservation to persons other than Indians.

In order to substantiate the tax-exempt status of a retail sale made within an Indian reservation to an Indian purchaser, unless the purchaser is personally known to the retailer as an enrolled Indian, the retailer shall require presentation of a tribal membership card identifying the purchaser as duly registered on the tribal rolls of an Indian tribe under such lawful criteria as the tribal organization has established. A record shall be retained by the retailer of all tax-exempt sales to support the sales tax deduction on returns filed with the Department, identifying the dollar amount of the sale and indicating the name of the purchaser, tribal affiliation of the purchaser, the Indian reservation to which or within which delivery or rendition of services was made, and the date of sale.

USE TAX

Indians and Indian tribes are not subject to the use tax upon the use of tangible personal property within an Indian reservation. However, Indians and Indian tribes will become liable for the use tax when any such property is placed into actual use outside the Indian reservation, irrespective of the fact that the first use of the property may have been within the reservation.

SPECIAL APPLICATION OF RETAIL SALES TAX AND USE TAX WITH RESPECT TO SALES OF MOTOR VEHICLES OR TRAILERS TO INDIANS AND INDIAN TRIBES. When motor vehicles or trailers sold to Indians or Indian tribes are licensed by the State of Washington at the time of sale, or at any time thereafter, a presumption is raised that such motor vehicles or trailers are for use on the highways of the State of Washington. When motor vehicles or trailers are licensed prior to delivery, dealers are required to collect the retail sales tax in every instance, regardless of delivery point. County Auditors must collect the use tax when Indians or Indian tribes apply for a license or transfer of registration unless the applicant can show that retail sales tax or use tax has previously been paid on the sale or use of the vehicle or trailer by the applicant.

CIGARETTE TAX

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this

rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.

Revised November 12, 1976.

[EXHIBIT C]

WASHINGTON STATE DEPARTMENT
OF REVENUE

EXCISE TAX BULLETIN

ETB 504.08.192 Issued November 24, 1976

SALES TO OR BY INDIANS

The purpose of the bulletin is to outline procedures to implement Rule 192, as revised November 12, 1976, and to provide additional details for explanation of certain provisions of that administrative rule.

1. **Registration Requirements.** All retailers within an Indian reservation are required to collect sales tax (and cigarette tax) on sales to non-Indians. This means that Indian retailers and Indian tribe retailers are required to be registered to collect and remit to the State the applicable State and local sales tax and the cigarette tax on sales to non-Indians, but no registration fee is required for registration of such retailers. (Such a business license

fee is constitutionally impermissible under Moe v. Salish and Kootenai Tribes, 48 L Ed 2d 96.)

Retailers can accomplish registration by telephoning or going to any of the following offices of the State Department of Revenue:

Aberdeen 2700 Simpson Avenue P.O. Box 1018, 98520	532-2840
Bellingham 2500 Elm Street, Suite A P.O. Box 1176, 98225	676-2114
Bremerton Great N.W. Savings & Loan Bldg. Lower Level, 5th & Pacific P.O. Box 407, 98310	478-4961
Ephrata 138 W. Division P.O. Box 1184, 98823	754-3771
Everett 2020 35th Street P.O. Box 6, 98206	259-8566
Longview P.O. Box 339 1418 15th St., Weyerhaeuser Credit Union Bldg., Rm. 304, 98632	577-2015
Mt. Vernon 416 Main Street (Monday only) P.O. Box 278, 98273	336-2954
Pasco 1600 C West Clark P.O. Box 767, 99301	545-2442
Port Angeles 1601 East Front Street Bldg. 2, Suite A, 98362	457-8503
Seattle 710 Second Avenue 901 Dexter Horton Bldg., 98104	464-6827

Spokane 300 Northtown Office Bldg. North 4407 Division, 99207	456-3140
Tacoma Rm. 207 Professional Bldg. 705 S. 9th, 98405	593-2874
Vancouver State Office Bldg. 904 Franklin Street P.O. Box 787, 98660	696-6151
Walla Walla 202 Drumheller Bldg., 99362	527-4306
Wenatchee 1139 Princeton P.O. Box 1945, 98801	663-1651
Yakima 214 Liberty Bldg. P.O. Box 407, 98907	575-2783
Olympia Headquarters 412 General Administration Bldg. Olympia, Washington 98504	753-5540

2. **Records to be Kept.** Sales to Indians, when delivery is made within the Indian reservation on whose tribal rolls such Indian purchasers are duly registered, are exempt from sales tax. But to demonstrate entitlement to make such sales without collection of tax, all retailers must retain, as a part of their books and records to be available for examination by the Department of Revenue as specified by RCW 82.32.070, the following for each sale:

a. Name of the Indian purchaser,
b. The tribal affiliation of the purchaser,
c. The Indian reservation to which or within which delivery was made, or within which retail services were rendered;
d. The dollar amount of the sale, and
e. The date of the sale.

Unless the Indian and his tribal affiliation are personally known to the retailer, the retailer must require

the purchaser to present a tribal membership card issued by the tribe in which the purchaser is registered.

3. **Measure of Sales Tax on Cigarette or Tobacco Products Sales.** Under the holding of our Court in Canteen Service, Inc. v. State (83 Wn 2d 761) and Tonasket v. State (84 Wn 2d 164) the cigarette tax and tobacco products tax apply upon the "first taxable event" in this state. This makes a different measure for the sales tax in the case of sales by Indians to non-Indians than is the case for a taxable sale by a non-Indian.

a. **Sale by an Indian to a non-Indian:** Here the first taxable event is the possession by the non-Indian and therefore the cigarette or tobacco products tax due on the sale is *not* a part of the selling price on which sales tax is due.

b. **Sale by a non-Indian:** Here the taxable incidence falls on the first handler, distributor, or seller and thus the first taxable event occurs when the products are first handled, distributed, or sold within this state. Since this occurs prior to the retail sale, the cigarette or tobacco products tax is a part of the selling price, even in the case of sales which are sales tax exempt under paragraph 2, above. Canteen Service, supra.

DEPOSITION OF CYRIL C. HERMANN

Held March 23, 1977
[Caption Omitted in Printing]

* * * *

[2] Be It Remembered that pursuant to Notice of Taking Deposition and on Tuesday, the 23rd day of March, 1977, commencing at the hour of 1:10 o'clock p.m. at the Federal Building, 450 Golden Gate Avenue, San Francisco, California, before me, Linda L. Russell, a Notary Public in and for the County of San Francisco, State of California, personally appeared

CYRIL C. HERRMANN,

called as a witness by the plaintiff, who, having been first duly sworn, was examined and testified as hereinafter set forth.

Office of U.S. Attorney, Eastern District of Washington, Box 1494, Spokane, Washington, 99210, represented by Dean C. Smith, Assistant U.S. Attorney, appeared as counsel on behalf of the plaintiff, United States of America.

Hovis, Cockrill & Roy, P. O. Box 437, Yakima, Washington, 98907, represented by James B. Hovis, appeared as counsel on behalf of the intervenor-plaintiff, the Confederated Tribes and Bands of the Yakima Indian Nation.

Office of the Attorney General, Temple of Justice, Olympia, Washington, 98504, represented by Matthew J. Coyle, Esq., appeared as counsel on behalf of the defendant, the State of Washington.

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[3] It Is Stipulated between counsel for the respective parties that this deposition may be reported in shorthand by Linda L. Russell, a Certified Shorthand

Reporter, and thereafter to be transcribed under her direction into typewriting.

IT IS FURTHER STIPULATED that all objections, except as to the form of the question, and all motions are reserved until the time of the trial.

IT IS FURTHER STIPULATED that in the event the witness is instructed not to answer questions propounded by counsel, it shall be deemed that the Notary Public has so instructed the witness to answer but that the witness still refuses to answer on advice of counsel.

IT IS FURTHER STIPULATED that the witness need not sign said deposition before said Notary Public.

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[4]

TUESDAY, MARCH 23, 1977 1:10 O'CLOCK P.M.

(Whereupon on Tuesday, March 23, 1977 at 1:10 o'clock p.m. the deposition of Cyril C. Herrmann commenced with the following people present: Mr. Smith, Mr. Hovis, Mr. Coyle, the deponent and the court reporter.)

MR. HOVIS: First, I'd —

It's agreed between all the parties here —

I'm James B. Hovis, attorney for intervenor-plaintiff. And the plaintiff is present through Dean Smith. And the defendant is present through the appearance of Matthew Coyle.

It is agreed that this deposition is being taken for the purpose of introduction into the evidence at the trial to be held on March 28th, 1977 in Spokane, Washington.

MR. SMITH: Seattle.

MR. HOVIS: In Seattle, Washington — beg your pardon. And at that time if there are — at the time of its introduction, if there are any objections as to the questions — outside of the form of the questions, objections will be reserved until that time.

MR. COYLE: Well now, Mr. Hovis, let me attempt to set the record straight.

I intend to object here to the questions and preserve my objections for the Court.

[5]

MR. HOVIS: All right.

MR. COYLE: I certainly intend to object here. And then, of course, the witness may answer.

MR. HOVIS: Do you wish to present your objections now or would you rather wait and present your objections if it's to something besides the form of the question at the time of the trial?

MR. COYLE: I will present my objections now at the deposition and again at the time of the trial.

CYRIL C. HERRMANN,

having been first duly sworn by the Notary Public, on his oath testified as follows:

EXAMINATION BY MR. HOVIS

MR. HOVIS: Q. Would you give your name, please?

A. Yes. My name is Cyril Herrmann.

Q. What is the address of your residence?

A. My residential address is 425 Eucalyptus Avenue, Hillsborough, California.

Q. I've asked you to be a witness in this cause here today?

A. Yes.

Q. Would you give us your educational background beyond high school, Dr. Herrmann?

A. Yes.

I attended the Northern Illinois State University [6] in De Kalb, Illinois. And I received my Bachelors degree there.

And then I was in the Navy for three and a half years in World War II.

Following that, I attended the Stanford Graduate School of Business, from 1946 to 1948. I received a Masters of Business Administration degree there.

And I then went to MIT, the Massachusetts Institute of Technology, to join the faculty. I joined the faculty on the first of July of 1948. And in January of 1949 I enrolled in the doctoral program over at Harvard.

And from 1949 until June of 1953 I worked on my doctorate while still continuing to teach a full-time load at MIT.

And I received my Doctor's degree from the Harvard Business School, but it was a joint program with the School of Economics, so that my degree is really in Applied Economics.

My major field of concentration at Harvard was in the field of Marketing. And the major course I taught at MIT was Marketing. I taught Marketing there for six years.

And then in 1954 I joined the Arthur D. Little Company.

Q. And so, what is your discipline that you studied — how would you classify yourself? As —

A. I consider myself an Applied Economist and I consider that Marketing is one of these areas of Applied Economics.

[7] Q. You went to work for Arthur D. Little, Inc. in 1954?

A. That's correct.

Q. And you have been employed by them since?

A. That's correct.

Q. What is your position with the company today?

A. I'm the Western Regional Vice President and I'm headquartered in San Francisco.

Q. Would you explain a little to us about what Arthur D. Little Incorporated is?

A. Yes.

It's a large diversified consulting and research company. It was established in 1886, and it is I believe the oldest and largest private — by that, I mean non-governmental — research organization of this type in the United States.

We have about 1,800 employees in Arthur D. Little. Last year our total revenues were about $86 million and our total assets are about $42 million. So that we are a significant factor in the consulting and research field.

Our company has a number of offices. Our headquarters are in Cambridge, Massachusetts and we have offices in various parts of Europe and South America and Canada.

Here in the United States, in addition to our headquarters we have an office in Washington, D.C. And our western headquarters are in San Francisco.

We do a variety of things ranging from being involved in [8] space shots and the heat probes that are put into the moon on moon shots.

At one end of the very scientific end of our company ranging back through life science, we are I believe the largest private cancer research laboratory in the country.

We have one building at our headquarters that contains some thirty or 40,000 research animals in order to conduct all of this research.

And then ranging across fields of engineering and applied mathematics and operations research on into regular management consulting work. And then into various areas of public policy, where we would be working for Federal, State or local agencies on such issues as — oh, environmental impact statements or land use planning studies or — whatever the particular orientation of the agency might be.

About 60% of our business is done for private clients and the other 40% ranges across the various Federal, State and local agencies along with certain institutions and associations that we might also classify as having a public orientation.

Q. Now in your work for the company, do you work in the field of Applied Economics?

A. Yes, I do.

Q. What are some of the things that you've done in that regard?

A. Well, one of the areas in which I have been rather [9] active has been in various forms of land use, land planning and land development. I do not mean development of buildings and so on, but rather the planning, the economic planning and feasibility planning that is done before a development takes place.

But I do have a considerable background in the field of land and what to do with land and what the highest and best use of land would be.

In this regard for a number of years I have been a member of the Board of Trustees of the Urban Land Institute, which is headquartered in Washington, D.C. And this is a non-profit research organization made up of people from private industry and from various public agencies that share a concern with the best quality of planning that can be done in the use and development of land.

I'm also a Vice President of the Urban Land Institute. This of course is not my job; this is an associated professional activity that I carry on.

In a somewhat different area I have been active in the kinds of market studies and market analyses that take place if we're doing a study having to do with an organization that's investigating an expansion of its market or bringing out a new product, something of that sort.

These are corporate clients, which I prefer not to name, because usually we're working for the competitive advantage [10] of that particular company. And we do not necessarily have permission to identify them. But I believe it's well known that the Arthur D. Little Company works on a continuing basis for many of the large firms in the Fortune 500 List, plus quite a sizable number of medium-sized firms.

Then another area in which I have had some experience is in the field of taxation.

I would say that this is a much lesser amount of my overall consulting activity, but I am in charge of an

assignment that we're just completing for the Bank of America. And they funded a piece of basic research that was an investigation of the tax revenue requirements of the State of California over the next few years.

Then an investigation of sources of revenue, and then some assessment of whether we might want to have some changes in our tax laws and tax structure here in California.

Several years before that, I did a tax study for the Board of Supervisors here in San Francisco. And that had to do with an investigation of how the City and County of San Francisco would raise additional revenues at a time when taxes on residential property were equalized with commercial and industrial property. And our recommendations to the Board of Supervisors were carried forward in that instance.

There are other related areas of Applied Economics that I'm active in. One of these is in the field of travel and [11] tourism. That has been significantly an international activity up until about six months ago when we were employed by the United States Senate Commerce Committee to do the research that would be helpful to the Senate in establishing a national tourism policy for the United States.

I also do some of my work in the field of education. I'm currently in charge of an assignment for the Glendale Unified School District in Glendale, California. And it is a cost impact study, measuring the increase in cost that might result from an organizational change that the district is contemplating.

So that after 1954 to 1977 — what is that? 23 years? I think I've had quite a broad and diversified consulting experience, but always with some unifying principle of Applied Economics and the feasibility of going ahead with some particular kind of economic activity.

Q. Now in line with your discipline and profession, did you visit the Yakima Indian Reservation?

A. Yes, I did.

Q. When was that visit?

A. It was approximately the middle of September. Well precisely, I visited there on September 14, 1976.

Q. When you were on the Yakima Indian Reservation did you visit their furniture factory?

A. Yes. My central purpose for being there was to visit [12] some of the smoke shops, but we had a little extra time and I asked if I might have an opportunity to stop and visit the furniture factory. And so I did have a chance to be taken to the factory by the Controller, and to gain some impression of it.

Q. Was it possible for you to visit the boat factory?

A. No. I saw the building because it was nearby, but I didn't have a chance to go through the factory itself.

Q. Or any of the other enterprises outside of the cigaret enterprise?

A. No.

I saw a salmon cannery, but I could not go through that. And I don't recall that I saw anything other than the furniture factory.

Q. How competitive is the furniture business?

A. Speaking in general terms, it's quite a highly competitive industry.

Design is important, of course. But designs also can be copied. And the particular situation of the furniture factory there on the reservation struck me as being quite highly competitive.

I was told, for example, that two operators had tried to successfully operate a furniture factory on that site in that building, and each had withdrawn apparently because it was not profitable. So —

[13] MR. COYLE: I'll object to that testimony on the grounds of hearsay.

THE WITNESS: I was told by the Controller that the tribe had taken over the furniture factory and were operating — it was operating it as a tribal enterprise and that they employed professional management.

There were about 95 employees. And as I recall, it was — about 65 of them were Indians from the

reservation. They sell in Oregon and Washington, according to the Controller. And I believe they use commissioned salesmen in order to carry out this end of the marketing.

And I recall that Sears & Roebuck is one of their important customers.

But the Controller also told me that they have to watch cost very carefully, and that it is generally quite a competitive undertaking. And that they have, of course, their share of competition.

MR. HOVIS: Q. Just one question before I go further:

The information you were receiving from the Comptroller and others on this visit was information that you were receiving as an expert economist to allow you to fulfill your work?

A. That's correct. That was my purpose in being there.

Q. Now we've talked a little bit about the competition of that specific area.

[14] Now generally, do you have any ideas or any opinions generally about the competition in the furniture business?

A. Well, my general background tells me that it's a competitive industry. It certainly has to be very cost conscious and of course it has to be quality conscious and design conscious too. But it's an established industry.

Location utility is fairly important. And being out there on the reservation, I presume that selling into the metropolitan markets of Oregon and Washington they would have a bit of a location disadvantage.

So that I could understand the Controller's emphasis that they have to be very careful about cost in order to remain competitive.

MR. COYLE: I'm going to have to object to that answer. It may be you can take care of it by rephrasing the question, Mr. Hovis.

The gist of it was that — as I recall, that you talked about a competitive disadvantage because of locational factors. You haven't identified any other

furniture manufacturer with whom they might compete.

To that extent, I have to interpose an objection.

MR. HOVIS: Your objection is noted.

Q. Do you have any opinion about the competitiveness of the boat-building industry?

A. Again, it's another industry that is quite competitive.

[15] But as I say, I did not have a chance to go through that particular plant.

Again, I accept the importance of design and quality in the boat-building field, just as it is true in furniture.

But in the final analysis the purchase decision will be importantly influenced by price once design and quality have been taken into account.

Q. Where was the industrial park where this boat-building factory was located and the furniture factory was located?

A. Well now, I don't recall precisely.

I believe it was on the west side of Toppenish, but I'm not certain. It was along the highway, anyway.

Q. I think you asked me this morning how to pronounce the name Wapato.

A. Yes. And that must be because I put in my notes that was the location.

Q. That was the location?

A. I have my notes here. May I consult them?

Q. Surely.

A. Yes. The industrial park — I visited the Mount Adams Furniture Factory there. I'm still not sure that I know how to pronounce it. So I'm glad to be instructed by you.

They had about 100,000 square feet in the furniture factory. My notes indicate it was built in 1967.

Q. But this location was distant from any metropolitan [16] center; was it not, Doctor?

A. Oh, yes indeed. It's remote from any metropolitan — well, when I say "remote" I mean it's more than 100 miles from any metropolitan center that I can think of.

Of course, that becomes a question of "metropolitan." But it would be what? About 165 miles from Seattle, something like that.

Q. Yes.

Where are most of the furniture manufacturing plants located in the West Coast?

A. Well, they tend to have a market orientation. I think you'd find that the general Southern California area would be one of the significant ones.

I can't tell you the situation in Puget Sound, but I would expect that if I were to look into that I'd find that there would be furniture manufacturing there.

Q. Now I want you to assume for the purpose of my question that all retail sales to non-Indians of both these boat and furniture products would bear a tax of 5.1¢ on each dollar.

What effect do you in your expert opinion believe this tax will have in regards to the seller of that furniture and boats?

MR. COYLE: I object to that question on the grounds that no proper foundation has been laid to document the witness' [17] expertise in the area of State and local finance.

MR. HOVIS: Q. Go ahead Doctor.

A. It's my understanding from visiting the furniture factory that they do not now pay such a tax, so that if this were to be imposed upon their price structure, if they had in effect to raise their price by that amount — and considering the relative locational disadvantage that they need to overcome, this could very well have the effect of taking away what profit margin they have.

In the nature of the industry, that could happen. And I should say here that I did not go over the books of the furniture factory with the Controller.

And so my response is more general than if I had analyzed their financial position.

But it's in the kind of industry where it could have the impact of putting them back into a loss position.

Q. Do you have an opinion of whether or not the collection of this 5.1¢ on every dollar of sales would cause a loss of profit to the seller?

MR. COYLE: Objection, for the same reason as before. And it's inconsistent also with the previous witness' testimony.

Your question asked him about 5% on sales. I believe the witness' testimony was that there is just a 5.1¢ tax on retail sales to non-Indians.

MR. HOVIS: Q. What effect would a 5.1¢ on each [18] dollar of retail sales to non-Indians have on those particular sales? Would it reduce the profit or —

A. It has the overall effect of increasing their selling price. I mean, that's what the ultimate effect is.

And that means that they have to find some way to reposition themselves in the market. And they're confronted then with either finding some way of lowering cost, like reducing the quality level of the product.

But then again they could very well lose customers because of that.

So that the likelihood is very great that the greatest impact would be in terms of reducing the economic viability of the enterprise.

Q. Now did you visit any of the tobacco retail outlets on the reservation?

A. Yes, I did.

Q. Would you describe how those are situated?

A. Yes. They're strung out along Highway 97. And the first — driving east from Yakima, the first one I stopped was the first smoke shop you encounter, which was the Triangle Smoke Shop.

And as I recall, that reservation extends some 35 miles from one side to the other. And so that the last smoke shop I visited was Holt-Brewer on the eastern extremity of the reservation.

[19] And then I visited several between those two, between those extremes.

Q. What do these smoke shops look like and what does the land situation involve?

A. They are very — extremely modest structures. It's not an exaggeration to say that they're almost shacks.

Some are nicely painted, and without exception I found them to be clean and so on. But there is very, very little investment in the structure.

Also, the structure tends to be very small. The selling space, I think in no instance would I estimate by eye that the selling floor itself exceeded 1,000 square feet. And I think that five or six hundred square feet of selling space would be about the average. This is an estimation by eye. I didn't get down and measure the dimensions of the selling floor.

They don't need very much storage space because they turn their inventory — oh, approximately two to two and a half times a month. And therefore, the little structure can be quite small.

Therefore, it's logical that it's on a piece of land that also is quite small. And I think the largest piece of land that I found was about a quarter of an acre.

And I believe that the Triangle Smoke Shop is on a piece of land that is — I was told about a tenth of an acre.

[20] In other words, the total land area seems to range between — oh, 5,000 and 10,000 square feet. That would be the total land area.

Frequently, the land area is irregular in shape, but always, of course, it's relevant to the highway.

Now not all smoke shops are right on the highway. But they all have an orientation so that they can be reached rather easily from the highway.

Holt-Brewer, for example, you need to turn off the highway and cross the railroad track before coming to his smoke shop. But there are signs which make it very easy to find it.

Q. What are their operating hours?

First, let me ask you: How many days a week were they open?

A. I think most of them, the ones that I talked with, stay open 7 days a week. And I think I have in my notes

the hours, but I don't know just where in my notes that is.

If I may, I'll answer your question this way, because I do not find in my notes a specific statement of the hours of each of these smoke shops. Rather, their hours are geared to the traffic on Highway 97.

And as I recall, they tend to open around 9:00 o'clock in the morning, but they stay open at night as long as it's feasible in terms of the afternoon and evening traffic on the [21] highway. And unless I were to go back and check in more detail I wouldn't be sure whether they all closed at the same time or whether they closed at different time schedules; and for that matter, whether the same smoke shop closes at the same time each day.

I do recall that the weekends tend to have somewhat different hours.

Q. How are these smoke shops staffed?

A. The typical operation will have the person responsible for the shop, and they will have, as is required, two additional employees. And they, the three of them rotate on a seven-day cycle.

Q. The — all the sales — do they take people on the premises?

A. Yes. The car will come off the highway and then it will drive up to the smoke shack, and most of the sales are made through a drive-in window; the same way you'd sell a drive-in hamburger. The car pulls up and the driver rolls down the window and the smoke shop operator slides open her window, and the car is close enough so that the cigarettes are handed out and money is handed in.

Upon occasion a car will park; the driver will go into the smoke shop. But more frequently it is a drive-in transaction where the driver doesn't get out of his automobile.

Q. I'm going to ask you to assume some figures here and [22] you can mark them down as you wish to — that we have in our Pre-Trial Order.

I'm going to ask you to assume first, that is the sales price of the cigarettes from these smoke shops are

$3.95. I'm going to ask you next to assume that the gross profit from the sale is 65¢ to the retailer.

I'm going to also ask you to assume that the same cigarettes off the reservation and on the reservation by non-Indian retailers to non-Indians have a total price of $5 a carton.

I'm going to ask you to assume that on the $5 a carton there is a State cigarette tax of $1.60 per carton and there is a State sales tax of 24¢ a carton —

MR. COYLE: Can we go off the record for just a minute, Jim?

MR. HOVIS: Yes.

(Discussion off the record.)

MR. COYLE: Back on the record.

MR. HOVIS: Q. I'm going to ask you also to assume that there is a Yakima Nation cigarette permit tax of 22 and a half cents per carton on the sales of all cigarettes by the Indian retailer to both Indians and non-Indians.

I'm going to next ask you to assume that if the State cigarette and sales tax was applied to the Indian sales to non-Indians that the average sales price would be $5.79.

[23] I'm going to also ask you to assume that if the non-Indian retailer sells to Indians on the reservation that the average sales price would be $4.76.

A. $4.76?

Q. $4.76.

And ask you also to assume that the sales to members of the tribe by Indians retailers would be $3.95.

I'm going to ask you also to assume that at least the majority of the sales by the Indian licensed retailers are to non-Indians. And therefore, that the majority of the sales would be at a $5.79 price.

What effect would this $5.79 price have on these enterprises in regards to their sales to non-Indians?

A. In my opinion, it would put the Indian smoke shops out of business.

I was quite interested in the demand elasticity situation when I was interviewing these smoke shops. And at the Triangle Smoke Shop I asked, "Why do you charge $3.80 for a carton of cigarettes," which was on that particular day of my visit for a particular carton that I was examining, a particular brand and so on — was the price. And I said, "Why don't you raise the price? If it's $5 at Safeway in Yakima, why do you only charge $3.80?"

And the response struck me as being very reasonable. There has to be a price incentive to offset the expense of [24] driving from Yakima out to the reservation, plus the time of the individual that's involved. So that at $3.80 the average sale, I was told, tended to be between two cartons and four cartons at the Triangle Smoke Shop. There is just enough incentive for people to drive out from Yakima to buy cigarettes there. And that really was an explanation that the operator of the smoke shop felt made sense for that operation, and that it was market competitive to be offering those cigarettes at that price.

Now by the time I got clear over to visit with Holt-Brewer on the eastern side of the reservation I found another kind of demand elasticity problem. His customers drive from the Tri-Cities, which is some 40 miles southeast of his smoke shop. And so, he simply isn't able to charge $3.80 a carton. And he told me that his average carton of cigarettes goes at $3.60 a carton.

But more than that, the people in the Tri-Cities will go together. And so you'll have, if you will, pooled purchases.

In other words, there would be four or five neighbors or friends and they'll all place their order. And then a single automobile will make that drive. And so the average size of sale, therefore, will also be larger. Holt-Brewer would sell six cartons, ten cartons or even more than ten cartons.

Now they may be different brands of cigarettes, and [25] some may be regular and some may be king-sized

because that one individual is filling several orders. And so, that's the economics of the Holt-Brewer operation.

Also, the people in the Tri-Cities could go to the State of Oregon.

When I was there, cigarettes were selling at, as I recall, $3.89 a carton over in Oregon. So that it's really a competitive business. And it's important that the smoke shops on the Indian reservation have this lower price because without the lower price there simply isn't any rational basis to drive all the way out to the Indian reservation to buy cigarettes. So that if you can buy cigarettes for $5 a carton at Safeway in Yakima and if you find you drive out to the Triangle Smoke Shop and you're asked to pay $5.79, it would of course be competitively irrational to complete such a purchase. And as soon as the buyer discovered that that was the price you could close that drive-in window on the Triangle Smoke Shop and put a padlock on it because there simply would be no basis to sustain that enterprise. It simply would have no alternative but to go out of business.

Q. If you would assume all the other facts that I've given, with one more assumption, that the total amount of sales to non-Indians would be 90% of the present volume, that 90% of the sales would have to be made at $5.79, how many — in your expert opinion, how many smoke shops would still be in [26] operation at the end of the year?

THE WITNESS: Would you read me the question, please?

(Record read.)

THE WITNESS: They would have to run some kind of a distress inventory. I mean, they would have to get rid of their inventory one way or another. Maybe the central warehouse would take the inventory back.

But there is simply no way to sustain the operation.

My answer would be zero.

MR. HOVIS: Q. Now in regard to the land use being made at these smoke shop locations, how would you —

Is that the highest and best use?

A. Very clearly.

I gave very careful examination to this question. And not only in my interviewing of the people running the smoke shops, but in my physical inspection of the general surroundings and of the retail activities.

I looked to see what other alternative land uses there were, and I was wondering about such things as franchise food operations, a fast-food operation, just an example.

But there were already some of these located in Toppenish. I think there were four that I counted there. And I believe that they were operated by non-Indian retailers rather than by Indians. That was the understanding I gained. But I didn't go personally to each of these fast-food shops and ask [27] that question.

I could find nothing that could compare with the kind of volume they're about to do from just a few hundred square feet of selling space, from a modest building of a very low investment and with a very small piece of land. It all boils down to this: It's the location utility of the land itself that had the real value in this retail operation.

And it's where the land is, its relationship to Highway 97, that is far and away more important than the building or anything else that goes on. But it assumes, of course, that they have a retail selling price that will create the traffic it takes to have those cars that are driving down Highway 97 pull off and buy cigarettes.

Q. Where does the economic burden of this — assuming that there would be an additional $1.84 placed on the present sales to non-Indians — where would the economic burden of that tax fall?

A. Well, the burden, the economic burden clearly will be borne by the people that are put out of business. The operator of the smoke shop and the employees who are paid to work there because they're simply — isn't going to be a business after this tax is imposed because it would be, as I said earlier, completely irrational for a

buyer to drive out to one of those smoke shops to make a purchase. So that the economic burden is borne by the people that are put out of work and put out of [28] business.

Q. Would the land have any economic burden, the land use have any economic burden?

A. The alternative land use for these odd, small parcels of land is very limited.

For example, I asked, "What's the size of this reservation," because it took us all day to visit these smoke shops and drive from one side of the reservation to the other. I was told, "Oh, there's something like 1.2 million —" In other words, 1,200,000 acres in the reservation.

Now if the average smoke shop has a total land area of between 5,000 and 10,000 square feet then we're talking about what? Three or four acres of land. So that to talk about alternative land use in terms of where these little smoke shops are located, you can only say, "Well, you know, could you sell diamonds; could you sell perfume?"

Well then, you get down to what kind of market these smoke shops are selling to.

And you have two problems. They're not really selling to people that are coming out to look for such high value luxury items. And of course the other problem is that the tribal enterprises are not at this point in time geared up to handle that kind of investment, that kind of management sophistication.

So that I would say there is really no practical [29] alternative land use for these specific locations where the smoke shops are located.

Q. Now in regards to the sales of furniture and boats and other like goods by Tribal Enterprises upon which the 5.1¢ per dollar tax would be imposed, where would the economic burden of that tax fall?

A. Assuming always that that furniture factory has to maintain its competitive posture in the market the extent to which this tax, this 5.1¢ tax were in any way to disadvantage the enterprise, the economic burden will be borne by the tribe through its involvement in The Tribal

Enterprise. And if it leads to people being laid off and reducing the labor force, then the Indians that are directly affected will bear that economic burden in an even more direct way.

MR. HOVIS: You may inquire.

EXAMINATION BY MR. SMITH

MR. SMITH: Q. Just an extension of your testimony regarding the situation on furniture and boat sales.

You mentioned that the imposition of a 5.1% tax on retail sales to non-Indians of furniture and boats, for example, could very well, very likely have the effect of making that part of that enterprise not economically viable.

A. That's correct.

Q. Is there any way in your opinion that The Tribal Enterprise could pass on that tax in order to avoid such an [30] economic impact?

A. Of course, they can try.

But the thing that happens in the tax field is that if the tax is broadly applied then everyone passes on that tax and builds it into the selling price.

But we're confronted here with a uniquely different kind of situation. The Indians do not pay that tax. The tax is not levied against them. And so they have achieved a position in the market now. And the position they have achieved is without the imposition of the 5.1%.

This may very well have offset some of the other disadvantages that they had to overcome. So that they have to try to persuade their buyers that they're increasing their prices 5.1%, when none of their competitors is increasing his price by 5.1%.

And as I say, I did not examine the books and I cannot tell you therefore what the impact will be.

I can only say that the likelihood is that the impact of that 5.1% is going to have to be absorbed within the business rather than being passed on to the customer.

Q. Passing then to the matter of cigarette sales.

And as just a minor extension of what you were stating in answer to Mr. Hovis' question regarding the effect of the imposition of the State tax, increasing the price to $5.79 a carton, you gave as your opinion the economic effect of that [31] would be to close all of the smoke shops that one would operate.

A. That's right.

Q. It would not be economically feasible; is that right?

A. They couldn't cover the labor cost of staying open.

Q. Assuming that there were 10% or even 15% sales to Indian people which — from those smoke shops which are exempt from the State tax, would that make the operation of any smoke shop a viable possibility?

A. Well, of course the tribe would have to give consideration to — like, could they save one, for example? But where would you put it?

I've just testified earlier to the extent of this reservation. Only 1 million acres of land. And as I recall it's some 35 miles from the Triangle Smoke Shop to the Holt-Brewer Smoke Shop just down Highway 97.

And so you have to consider then the dispersal of population on the reservation.

I think rather you would probably try to work out some kind of a plan where you could have a little cigarette counter that was just an adjunct to something else that was going on or something else that was being done, like, you might have it where I attended the Tribal Council meeting, for example.

But I think you would also need to have these counters, if you will, in other locations. I'm afraid you could not go [32] to vending machine sales, because then you'd have no control over the retail sales. So that the tribe is really confronted with a difficult problem — for all practical purposes a $5.79 selling price puts all of the smoke shops out of business. That 10% or 15% volume that you're referring to that might be done on the reservation has to be accommodated then to a style of

retailing that only accommodates a little bit of labor at the time of the transaction, and that labor can be employed on other activities when the cigarette sales aren't going on. And I have no specific suggestion to offer to you just how that problem is going to be worked out.

Q. Would it then be your opinion that even as to that — well, say 10%, that there wouldn't be a viable economic reason for the existence of any retail cigarettes?

A. In my opinion, no, because the exsiting operations that I examined are geared to volume sales of cigarettes. And that would no longer be possible.

Q. All right.

Apropos of your testimony regarding the effect on land values, I don't know if you fully answered Mr. Hovis' question, and I'll ask you specifically.

Do you then — is it then your opinion that the economic burden of the imposition of this State tax falls upon the land itself?

A. The heaviest part falls on the land itself.

[33] And if I may, I may repeat a bit of what I said. But I'd like to answer this question fully.

Considering the land, labor and capital that's involved in operating smoke shops, the capital investment is quite modest. Considering the labor, you have the smoke shop operator, typically supported by two employees. They're not necessarily full-time employees; it depends upon the size of the particular smoke shop. But your total labor force is no more than three people.

Now of course, they will carry a very direct and immediate economic burden if they're thrown out of work. But viewing this as a going enterprise, you know, who reaps the reward of the activity?

And as it relates to land as opposed to capital that's invested in the building and the inventory, or as opposed to the labor, the real rationale for the success of any of these smoke shops is the location utility of the land itself. And if that's the main reason for the success of the smoke shop, then conversely the main burden — when a smoke shop is closed up — is if the value of that land falls

to something approaching — I say approaching zero, because obviously the land has some value, but the value of land always is a function of the economic activity that can be carried on upon the land.

And if you lose the highest and best use and there are no viable alternative uses, then your land drops to a very [34] nominal value. And so that economic burden is borne by the tribe.

MR. SMITH: That's all the questions I have.

MR. COYLE: Can we take a short ten-minute recess while I collect my thoughts?

MR. HOVIS: Sure.

MR. COYLE: Thank you.

(Recess taken.)

MR. COYLE: On the record.

EXAMINATION BY MR. COYLE

MR. COYLE: Q. Dr. Herrmann, is there a recognized academic discipline known as Public Administration?

A. Yes, there is.

Q. Within that field is there a recognized academic discipline known as Public Finance?

A. Yes, there is.

Q. Do you have any training in either of those two fields, any formal academic training?

A. Yes, I do.

Q. What is the nature of that training?

A. I have, at both the Stanford and Harvard Business Schools, studied Finance.

In my consulting activities at Arthur D. Little, I've done a considerable amount of work for public agencies as opposed to corporations.

[35] And I have had teams of people working with me on a variety of issues where finance is a question.

And so that I have learned through my experience at Arthur D. Little something of the public finance side as opposed to the corporate finance side.

I might illustrate. I've just completed an assignment for the Port of Los Angeles, and the question there has to do with the expansion of the port. And the problem is whether or not the port can sustain any bond issue of $70 million. And we were associated with an engineering firm called Tudor Engineering, which did the physical evaluation of the port facilities. And I was in charge of the economic evaluation.

So that this would be in an area where you would commonly say, "This is public finance as opposed to corporate finance."

Q. Have you done any formal publishing in academic journals in the past ten years as opposed to regular — the work product of your company?

A. Yes, I had an article in the Harvard Business Review a few years ago. I don't recall the exact date, but I think it was about ten years ago.

I have had some of the things that I've written included as a chapter in a book.

And I've had papers included in the proceedings of conferences such as the Urban Land Institute and Pacific Area [36] Travel Association.

Q. Did any of those published articles — were any of them primarily devoted to the field of Public Finance?

A. Not per se.

Usually I'm concerned with an issue or a policy question.

But as I indicated earlier, as a general rule, I'm concerned with something in terms of its feasibility and viability. So that the question of finance, whether it's in either a corporate or public setting, is very frequently included.

Q. I believe you testified that you visited the Yakima Indian Reservation on September 14th, 1976; is that correct?

A. Yes, that's correct.

Q. What was the purpose of that visit?

A. To become familiar with the smoke shop operations. That was my primary purpose.

Q. Had you or your firm been hired by someone to familiarize yourself with that operation?

A. We were invited to consider it. And in our company we frequently ask and are given the opportunity for an assessment before we actually undertake an assignment.

For example, I follow up by writing what in our company we call a proposal, and if that is accepted it then becomes a contract.

[37] I would not have attempted to write that proposal without having first visited the reservation to inform myself generally about the Yakima Nation.

I had an opportunity to meet with the Tribal Council and then I had a specific opportunity to visit a number of these smoke shops.

Q. Did you write up this proposal?

A. Yes, I did.

Q. Did the proposal become a contract?

A. I believe that it either has — it's my understanding that it has been executed by the Yakima Nation.

It's addressed to the — Mr. Watson Totus, who is Chairman of the Yakima Indian Nation.

Q. Has this contract resulted in a written work product?

A. No, it has not.

Q. Is it ultimately intended to result in a written work product?

A. Not necessarily. The ultimate intent is that I will testify in Federal Court.

Q. In this particular case?

A. Perhaps I should say testify in court. I'm not a lawyer and I'm not sure what court I will be asked to submit my testimony.

MR. HOVIS: He asked: Was the proposal you made in regard to this particular case?

[38] THE WITNESS: My proposal has to do with the problem of the smoke shops if taxes are imposed. I include in my scope of work an assessment of the impact of

imposing Federal income taxes by the Bureau of Internal Revenue, which is another kind of tax problem.

I might add that I have testified as an expert before the Bureau of Internal Revenue.

MR. COYLE: Q. Turning to the furniture industry of the Yakima Indian Reservation.

Did you testify that Sears & Roebuck is a customer of that enterprise?

A. Yes, I did.

Q. Did you inspect the books and records of that furniture enterprise?

A. No, I did not.

Q. Did you make any attempt to?

A. I did not inspect any records.

Q. Did you make any attempt to determine to what extent the furniture enterprise sells to retailers; that is, as a wholesaler and to what extent it actually acts as a retailer to non-Indians?

A. I asked the Controller how they carried out their marketing operation, and he told me that they use commissioned salesmen and that they sell in Washington and Oregon. And it was at that point he said that Sears & Roebuck is an important [39] customer.

Now it was my impression that the commissioned salesmen sell to Sears & Roebuck. But that's only an impression. It may be that they sell directly to Sears; I don't know.

I did not ask specifically whether that furniture factory has any direct retail sales or whether it's 100% through commissioned salesmen.

Q. Dr. Herrmann, I'm going to ask you a question that's going to require you to make a couple of assumptions. You may wish to write them down.

Assuming that in the furniture industry it is a highly competitive industry at the producer level; that is to say, many producers. And further assume that the primary decision of a purchaser will be with regard to price. That is to say, as you testified earlier, when design, construction and various other factors are balanced out,

would a producer, a manufacturer of furniture who does not pay a tax, either net income or gross income for the privilege of producing furniture, have a competitive advantage over a producer who does pay such a tax?

A. That's the question?

Q. That's the question.

A. My answer, of necessity, has to be: It all depends upon the factors that are involved in establishing a competitive place in the market.

[40] If everything was exactly equal, if location was equal, if labor costs were equal, if everything were equal and the only variable were the tax, then of course there would be an advantage to the enterprise that does not pay the tax.

If the enterprise that has established itself in the market is dealing with all of the variables that enter into the enterprise, such as developing Indian labor and creating the skills and giving them the training so that they can get their productivity up to competitive levels in the industry, as an example, if — you know, if that cost of training and developing Indian labor is an added cost that would not be incurred if you moved into a metropolitan area where you could immediately tap an experienced labor pool that had already worked in the industry before, then you wouldn't have an offsetting problem that requires some kind of a break in the market to offset the fact that they're not paying taxes.

If my information was correct, that two previous operators had tried it, I'm led to the inference that there couldn't have been a great deal of margin available operating out of that Indian reservation location. That's why I believe that it's extremely significant in terms of the continued viability of that enterprise, the Mount Adams Furniture Factory.

If — without getting any other kind of a break in the variables of business — if the tax is simply added on top, then it's going to have a very significant adverse effect.

[41] Q. Are you generally familiar with the tax structure in the State of Washington?

A. No, I am not.

I — I have certain impressions about it, but' I'm not familiar with the overall tax structure.

About five years ago we did a study of the tax structure in the State of Washington, but although I had managerial responsibility I was not directly involved personally. And of course, that study is about five years old.

So that our company has some some knowledge of it, but I do not claim any particular expertise as an individual in the Washington tax structure.

Q. Is it your testimony that one of your primary fields of emphasis is in the area of marketing and marketing analysis?

A. Yes.

Q. Based upon your experience in that field, would it be your opinion that the primary purpose of locating smoke shops along Highway 97 would be to attract non-Indian customers?

A. Yes, I very definitely believe that.

Q. Do you have any knowledge about the price elasticity of cigarettes?

A. I believe I have some knowledge of that, yes.

Q. Would you say that the price elasticity of cigarettes is highly elastic or highly inelastic or somewhere in between?

A. It's in the direction of highly elastic. There are — [42] There are brand preferences, clearly, but it's a highly elastic price competition.

Q. Well, let me ask this question then:

Is the demand curve for cigarettes highly elastic or highly inelastic?

A. Highly elastic.

Q. Would you please explain what you mean when you say, "highly elastic" in terms of the effect on demand in price?

A. Yes.

Let's first of all assume that there is an adequate supply so that we're dealing now just with demand.

And let's accept that the prices are posted and are easily discovered and so that there is pretty good information available to the consumer.

And with that knowledge on the part of the consumer, and including here any slight monopolistic preference that would lead a person to pay a little bit more for a cigarette that has a particular filter or an extra milligram of length or something like that, those things are very minor. Cigarettes are sold almost like commodities because they're so standardized in terms of price. And so that the price mechanism is really the determinant of the demand elasticity for cigarettes.

Small changes in price can have a significant change on sales.

Q. In terms of total volume of sales?

[43] A. Yes, yes.

Q. Is that true of cigarettes as a whole, or is it true with reference to brand — switching from one brand to another?

A. It's true for cigarettes as a — generically speaking, it's true for cigarettes.

Q. Is that same principle applicable to the sales of liquor also?

A. I would say that it is in general terms.

I think there is less price elasticity in liquor than in cigarettes. That's an impression on my part.

But still liquor, again generically speaking, has price elasticity rather than inelasticity.

As I say, I think it's less true for liquor than for cigarettes.

Q. That is to say, as the price rises for liquor demand does not tend to be — does not tend to decrease as fast?

A. Quite the same way.

I'm thinking of our fair trade laws here in the State of California as one of the illustrations that there is

not quite the elasticity in liquor that there is in cigarettes.

Q. Do you base your testimony about the demand elasticity of cigarettes upon your own personal studies or upon readings in the literature?

A. I believe I would say both, if you would accept that I — every week I am continuously reading the business [44] literature. And whenever anything about cigarettes appears I'm very likely to be aware of it.

I say that as opposed to I haven't gone to the library and checked out a lot of books and made a — you know, a term paper on cigarettes or something like that.

Q. Dr. Herrmann, are you generally familiar with the term "shifting of taxes"?

A. In what context is the term employed?

Q. Well, let me ask you this:

Are you generally familiar with the term "shifting of taxes" as employed by economists?

A. It would be helpful if you told me which economist or economists you were referring to.

Q. Well, let me hand you a book here. The book is called *Principles of* — the book is *American Public Finance* by Shultz and Harriss. And on page 164 of that book they discuss the principle or the definition of shifting of a tax.

Right up at the top there, Dr. Herrmann.

A. Yes. I'd say I'm quite familiar with this. It's — in effect, it's passing the tax along from one level to another.

Q. And also on the same page, the authors talk about incidence of a tax. Are you familiar with the term "incidence of a tax"?

A. Yes.

Q. Will you please define "incidence of a tax" as you [45] know it?

A. Yes.

That's where you finally get to biting the bullet because you can't shift the tax any further.

Q. Is that synonymous with "economic burden of a tax"?

A. No, it is not.

Q. What does the term "economic burden of a tax" indicate?

A. Economic burden indicates where the hardship is going to be felt in terms of the operation that's under examination.

Q. When you say "where the hardship is going to be felt," what does that mean?

A. Well, yes, I'm glad to elaborate.

For example, if an Indian smoke shop on the Yakima Reservation has to charge $5.79 for a package — or for a carton of cigarettes you can say that you have shifted the tax forward to the non-Indian, who is supposed to drive up and pay $5.79 for that carton. And you can say that the incidence therefore is with the non-Indian driver that drives up.

But that's all theoretical. It's not real world. The real world burden is that you're putting these smoke shops out of business, and that it's the tribe and the Indians that are bearing the burden of the imposition of the tax. It's an Alice-in-Wonderland thing to say that the smoke shops have the privilege of charging of $5.79 a carton when there is no rational basis for anybody to ever pay that.

[46] Therefore, the burden falls on the tribe and the incidence and the shifting; it's just — it's theory. It's meaningless here.

Q. It would be your testimony then that the tribe and its retailers cannot shift the economic burden of the tax to their non-Indian customers?

A. That's correct.

Q. Why is that?

A. Because it would be a completely irrational act for a non-Indian buyer who can buy cigarettes at $5 a carton at Safeway in Yakima to drive all the way out to the reservation and then be asked to pay a higher price.

I've testified earlier that the Indians require a lower price in order to offset the disadvantage they have of being remote from markets.

So in order to get those automobiles that drive down Highway 97 to stop, there has to be a price incentive sufficient to offset the cost and the time inconvenience of driving out there to buy cigarettes.

So that for them $3.80 per carton is very competitive with $5 at Safeway in Yakima.

Q. In effect then the only way to attract these non-Indian customers to the reservation is to exempt the tribe from the duty of collecting the State tax?

A. Well, that's one workable mechanism. That's the [47] mechanism that's working at the present time.

They need a lower price.

Q. You testified earlier that the Holt-Brewer operation at the — I believe the southern end of the Yakima Reservation; that is, the end of the reservation closest to the Tri-Cities —

A. Yes, that's correct.

Q. — sells — has an average sale of eight to ten cartons.

A. I did say that.

Q. And upon review of your notes, have you come up with a different average figure?

A. Yes.

In looking through my notes while we took a break I was told by Holt-Brewer that the average sale is 20 cartons.

Q. That was under the circumstance where people would drive 40 miles from the Tri-Cities and buy for their neighbors; is that correct?

A. That's correct.

When I was there — and I didn't count up every carton — but a man drove up in an automobile and he bought four or five different brands. And that was what caused me to inquire, you know, can one man smoke all those different kinds of cigarettes?

And this man told me he was buying for his friends, and this is a procedure they go through.

[48] MR. COYLE: I have no further questions.

FURTHER EXAMINATION BY MR. HOVIS

MR. HOVIS: Q. I think I forgot to ask you, Dr. Herrmann, what is your position with Arthur D. Little now?

A. I'm the Western Regional Vice President for Arthur D. Little.

Q. What is your area of supervision?

A. Well, the Western Region is the 11 western states, Alaska and Hawaii. And that's generally speaking my area of responsibility.

Q. Who is the Chairman of the Board of Arthur D. Little Incorporated?

A. General James Gavin is currently the Chairman, and he has been Chairman for some years. At the annual meeting of Arthur D. Little that will take place later this week, General Gavin is stepping down and becoming Chairman Emeritus because he's reached that age. And our new Chairman of the Board will be Robert Meuller. That's spelled M-e-u-l-l-e-r.

MR. HOVIS: That's all.

(Whereupon the deposition of Cyril C. Herrmann was adjourned at the hour of 3:00 o'clock p.m.)

/s/_____

CYRIL C. HERRMANN

* * * *

[Jurat omitted in printing]

STATE'S MOTION FOR PARTIAL NEW TRIAL

Filed May 22, 1978
[Caption omitted in printing]

Pursuant to Fed. R. Civ. P. 59(a)(2), the defendants hereby move for a partial new trial, the new trial to be limited to the issue of the power of the State of Washington to impose (1) its cigarette tax (chapter 82.24 RCW and the administrative regulations promulgated thereunder) upon non-Indian purchasers from Indians and (2) its sales tax (chapter 82.08 and the administrative regulations promulgated thereupon) with respect to these same transactions.

As grounds for this motion, defendants rely upon two decisions of the United States Supreme Court which clarify the source, nature, and limits of tribal power over Indians and non-Indians, but which were rendered after the decision of this Court and were, accordingly, not available to this Court in its consideration of this case. Those decisions are *Oliphant v. Suquamish Tribe,* ____ U.S. ____ (46 LW 4210, March 6, 1978), and *United States v. Wheeler,* ____ U.S. ____ (46 LW 4243, March 22, 1978). Defendants further rely upon a decision of the 10th Circuit, rendered February 17, 1978, *Ute Indian Tribe v. State Tax Commission of the State of Utah,* No. 76-1602.

As will be shown in the brief of defendants to be filed herein, the grounds relied upon by the majority in that portion of its decision as to which a new trial is being requested are completely inconsistent with those decisions.

DATED this 19th day of May, 1978.

/s/_____
SLADE GORTON
Attorney General

/s/_____
MATTHEW J. COYLE
Assistant Attorney General

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed August 14, 1978
[Caption omitted in printing]

1. Notice is hereby given that the State of Washington, defendant above named, hereby appeals to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff and intervenor-plaintiff:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against the Tribe or its retail dealers are unlawful in that the State's taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) A declaratory judgment that the application of the State's sales tax to tribal cigarette sales to non-Indians has been preempted and that any attempted enforcement thereof or regulations promulgated thereunder are unlawful; and

(3) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington cigarette excise tax and sales tax to tribal cigarette sales.

2. The defendant State of Washington moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment stated above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of August, 1978.

SLADE GORTON, Attorney General
State of Washington

Richard H. Holmquist
Sr. Assistant Attorney General

By: /s/_____
Matthew J. Coyle
Assistant Attorney General

Attorneys for Appellants-
Defendants

* * * *

SUPREME COURT OF THE UNITED STATES

No. 78-630

WASHINGTON, et al.,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, et al.

APPEAL from the United States District Court for the Eastern District of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

February 21, 1979